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No. 82-1712

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

ROBERT MATA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly apply 28 USC § 2254(d) in determining whether factual findings by the state courts were fairly supported by the state court record?

   A. Is a "substantial evidence" test applicable?

   B. Does § 2254(d) apply to implied, as well as express findings by the state courts?

   C. By what standards are questions of credibility and conflicts of evidence to be resolved?

   D. Does a court of appeals apply a different standard than that applied by a district court?

2. Does the mere fact that pretrial identification procedures involving photographs have been used weigh against the admissibility of resulting eyewitness identification evidence?

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 20, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 696 F.2d 1244. A copy of the opinion is attached to this petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 20, 1983. This petition for certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, section 1, provides in part:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28, United States Code, section 2254, provides in pertinent part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground the he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made

by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process

of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence

of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

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STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On July 4, 1973, respondent was sentenced to life imprisonment following his conviction for first degree murder in the Superior Court of California, County of Kern.

On his direct appeal, the California Court of Appeal affirmed the judgment of conviction. A copy of the Court of Appeal's opinion is attached as Appendix A.

No petition for hearing by the California Supreme Court was sought.

In State habeas corpus proceedings, the Superior Court for the County of Marin denied respondent's petition in a minute order on April 1, 1977; the Court of Appeal for the Fifth Appellate District summarily denied respondent's petition on August 2, 1977; and the

California Supreme Court summarily denied respondent's petition on November 14, 1977.

B. Proceedings in the Federal Courts.

On December 9, 1977, respondent filed a petition for a writ of habeas corpus pursuant to 28 USC § 2254 in the United States District Court for the Nothern District of California. On May 23, 1978, the district court filed a judgment and order denying the petition. A copy of the court's opinion is attached as Appendix B.

On December 21, 1979, a majority of a panel of the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the case to that court with directions to "hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a

new trial against appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced." Mata v. Sumner (9th Cir. 1979) 611 F.2d 754, 760.

A petition for rehearing and suggestion for rehearing in banc was filed on January 4, 1980. On January 31, 1980, the court denied the petition for rehearing (though one judge would have granted it) and all three judges rejected the suggestion for in banc review.

A petition for writ of certiorari was timely filed and was granted by this Court on July 2, 1980. In an opinion filed on January 21, 1981, this Court vacated the Ninth Circuit's opinion and remanded the case to it for further proceedings consistent with its opinion. Sumner v. Mata (1981) 449 U.S. 539.

On June 29, 1981, without receiving further evidence, the Ninth Circuit

issued another opinion. It adopted its prior opinion "insofar as it discussed the merits of the controversy." Mata v. Sumner (9th Cir. 1981) 649 F.2d 713, 714. It again concluded that the order of the district court should be reversed and that respondent Mata should be granted a new trial at which "constitutionally impermissible evidence" could not be introduced against him. Id. at 717. One judge again dissented. Id. at 717-718.

A petition for rehearing and suggestion for rehearing in banc was timely filed on July 13, 1981. The petition for rehearing was denied by a majority of the panel (with one judge dissenting) on August 6, 1981, and the suggestion for rehearing in banc was rejected on the same day.

A second petition for writ of certiorari was timely filed. In a per

curiam opinion filed on March 22, 1982, this Court granted the petition for writ of certiorari, vacated the judgment of the Court of Appeals for the Ninth Circuit and remanded the case to that court for further proceedings consistent with its opinion. Sumner v. Mata (1982) 455 U.S. 591.

On January 20, 1983, without receiving further evidence, the Ninth Circuit issued its third opinion in this case. For the third time it concluded that the order of the district court was to be reversed. Upon remand the district court was directed to "hold the Petition in abeyance for a period of ninety days, within which time the state prosecutors may, if they so choose, initiate a new trial against Mata, a trial in which prosecutorial evidence barred by the Federal Constitution will not be introduced." Appendix C, pg. 45. One judge again

dissented. Appendix C, dissenting opinion.

C. Statement of Facts Adduced at Trial.

1. The Murder.

Rumor that the victim, Leonard Arias, was being transferred to the California Correctional Institution at Tehachapi preceded his arrival (RT 638-639, 1162). Arias, a member of the "Nuestra Familia" prison gang, had reportedly stabbed a member of the rival "Mexican Mafia" gang at San Quentin Prison. In retaliation, the "Mexican Mafia" put out a "contract" on his life (RT 823, 955).

Carlos Ortega, chief of the "Mexican Mafia" at Tehachapi, testified that respondent Mata and his two codefendants, Gallegos and Vargas, were "Mafia" members (RT 811-812, 834-844). In October of 1972, Mata informed Ortega that they had been ordered to

"hit" Arias and advised him of Arias' arrival at Tehachapi (RT 822-824). On October 19, 1972, Ortega met with Mata and Gallegos, who wanted to "get down" (i.e. -- arm themselves with knives and stab Arias) (RT 827-828). Vargas joined them and said, "We've waited long enough." (RT 828-829). Mata, wearing black gloves, tried to give Ortega a knife but Ortega refused (RT 829-830). Mata said he had another knife inside his belt (RT 831).

Joe Escobar, an officer of the Nuestra Familia, observed the three defendants talking with Ortega before proceeding toward Dorm 8 (RT 1175-1176). All three were wearing watch caps, and Mata and Gallegos were wearing gloves and blue Levi jackets (RT 1176).

In Dorm 8, the victim was socializing with inmates Jay Allen and Rigoberto Almengor (RT 583-584, 600). Paul

Childress, another inmate who lived in Dorm 8, knew Mata from a prior drug deal and noticed him standing by the bulletin board in the dorm (RT 268, 273). He also observed Gallegos walking in the dorm (RT 271-272).

At about 1:30 p.m., Arias, accompanied by Allen and Almengor, started to leave the dorm (RT 372-373, 583). There was daylight in the dorm and visibility was excellent (RT 801, 947).

Almengor saw two inmates standing by the bulletin board and a third inmate leaning against a nearby wall. They did not live in Dorm 8 and he did not know them, though he had seen Vargas before (RT 374, 745, 957-958, 966). Allen also saw the three men (RT 795). He knew Mata since they once resided in the same dorm (RT 595). In tape recordings made during the next eleven days, both Allen and Almengor described all three as

wearing black leather gloves, state-issue jackets and pants and navy blue knit caps (RT 621-622, 746, 969). Allen thought all three men had mustaches (RT 621). Almengor described one of the men as dark complected, with a small, thin mustache, and described Vargas as "an Indian dude" with a thicker mustache, who was taller than the other two (RT 479, 961, 970).

As Arias and his companions approached, the three defendants attacked Arias with knives (RT 958). Vargas, armed with a long knife, pulled down Arias' shoulder and stabbed him (RT 749, 795-796, 959). Vargas also jabbed at Allen, and ripped his jacket (RT 796).

Meanwhile, in the midst of this attack, Almengor and Mata made eye contact. Mata came at him with a knife (RT 379, 747, 960). He swung twice, and Almengor tried to kick the knife out of

his hand (RT 380). They then fought with their fists, swinging several times at each other (RT 380, 747, 960).

As Mata backed off, they stood "looking directly at each other." (RT 960). Turning his attention back to the stabbing, Almengor heard and saw a knife fall to the floor, and saw Arias falling (RT 381-382, 747-748). Almengor again looked Mata in the face, motioning that he wanted nothing to do with this (RT 382). Mata seemed to understand. He turned and ran out the door, followed by his codefendants (RT 383, 748, 960).

Childress testified that he observed Arias, Mata, Gallegos and Vargas fighting (RT 275, 279). He thought it was just a fight until he saw a small silver knife fall to the floor (RT 276). He then returned to his bunk area (RT 281).

One and a half minutes after hearing the fight in Dorm 8, inmate Juan Olvera

saw Gallegos coming from nearby Dorm 6 (RT 512). He told Olvera, "If they ask about me, tell them I have been with you the last hour" (RT 513). Gallegos was nervously clenching a pair of black leather gloves (RT 514). A short time later, Gallegos was seen in the library, exchanging a magazine containing a piece of shiny metal with another inmate (RT 1179).

At about 2:00 p.m. a search of the institution was conducted (RT 658). A knife was discovered in the trash can of Dorm 5, and a blue Levi jacket with blood on the sleeve was found under bunk 56 of that dorm (RT 659-661). Almengor testified that this knife looked like Mata's knife (RT 380). Mata resided in bunk 60 of this dorm (RT 658, 662).

The following day, Childress became frightened by the actions of several Mexican inmates, including Mata, with

reference to him (RT 283-284, 948-949, 952). He went to Sergeant Mills' office and told Mills what he had seen, identifying Mata and Gallegos by name (RT 284-285, 693, 947-948). He identified photographs of Mata and Gallegos (RT 285-286, 676, 681). After looking at about 70 photographs of inmates from Dorms 5 and 7, he finally identified Vargas' picture from the photos of inmates in Dorm 6 (RT 681-682).

At trial, Allen and Almengor made definite in-court identifications of Mata and Gallegos, but repudiated their pretrial identifications of Vargas and would not identify him in court (RT 375, 404, 418-419, 425-426, 587, 597, 623-624).

Respondent Mata's defense was alibi. He offered three witnesses who testified that he was on his own bed playing cards near the time when the stabbing occurred (RT 1016, 1106, 1131).

2. The Pretrial Identification Procedures.

October 19, 1972.

Allen and Almengor were both interviewed on the evening of the stabbing (RT 710, 719-720, 914, 923-924). Allen said he was unable to make any identifications and was not shown any photographs (RT 719-720, 924). Almengor asked to be shown photographs of the Mexican population in the medium security side of the facility, and was shown about 200 photographs of all the inmates on that side (RT 397, 914, 959). Almengor named "Bogus Pete" Nunez as one of the assailants -- a name provided to him by other inmates based upon his description of one of the men he had seen (RT 399-400, 711). Almengor identified a photograph of Nunez but was not positive, saying it looked similar to the assailant (RT 398-400, 711, 780-781). He also tentatively

identified defendant Vargas, and inmates Ramirez and Reymundo (RT 914-915). Almengor testified that he selected eight photographs as bearing similarity to the three assailants (RT 401, 466). Almengor requested larger, more recent photographs (RT 401).

October 27, 1972.

Thereafter, a major prison disturbance prevented contact with Allen and Almengor for the purpose of making identifications until October 27, 1972 (RT 725, 927).

Allen was shown a group of 24 photographs (People's Exhibit 23)[1] which included pictures of Mata, Gallegos and Vargas. He again claimed he was unable to make an identification, complaining that the photographs were too old (RT

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1. Exhibits 23 and 24 were transmitted to this Court by the Clerk of the United States Court of Appeals for the Ninth Circuit on April 15, 1980.

720-721, 924). Almengor also viewed Exhibit 23 (RT 715). Outside Allen's presence, Almengor again tentatively identified Vargas (RT 437, 959). He asked for more recent photographs, feeling that the appearance of inmates represented in the photographs had changed (RT 716, 959-960).

Acting on this request, a number of inmates were photographed, but due to a mistake by the photographer, the pictures did not come out (RT 716). The three defendants were photographed a second time, and other photographs were reproduced to the same size (RT 716). These photographs were incorporated into a group of photographs which were introduced at trial as People's Exhibit 24. All 15 photographs included in this group are black and white, are the same size, have the same quality of "newness" and are of inmates of Mexican descent.

October 30, 1972.

Almengor and Allen were shown the group of photographs introduced as Exhibit 24. Almengor identfied Mata, Gallegos and Vargas. He was able to identify Mata because "he was looking at me eye-to-eye . . . at the time of the stabbing . . . ." (RT 742).

Allen was brought in next. While Almengor stood on the other side of the room, Allen also identified Mata and his codefendants as the assailants (RT 722). He testified that when he was first shown the pictures he did not make any identifications because he did not want to get involved (RT 650). His identifications were based on his observations at the scene, and the correctional officers did not influence them (RT 650).

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REASONS FOR GRANTING THE WRIT

28 USC § 2254(d) provides that a determination by a state court, after a hearing on the merits of a factual issue, "shall be presumed to be correct" unless it is shown that the hearing was not a full and fair one or unless the federal court concludes that the state court record as a whole did not "fairly support" the factual determination of the state courts. If the presumption applies it can only be overcome if the applicant produces "convincing evidence" that the factual determination by the state court was erroneous.

In its previous opinions in this case, this Court held that a federal court, if it determines the presumption to be inapplicable, must include in its opinion the reasoning which led it to that conclusion. The Ninth Circuit's most recent opinion demonstrates that

further guidance to the federal courts is necessary. That guidance should address questions in the following areas, among others; (1) Under what circumstances does a state court record not "fairly support" a particular factual determination? Is the test similar to the one applied in determining whether a person has been denied due process by being convicted on insufficient evidence? (2) Must the federal court apply § 2254(d) only to express factfindings by the state courts? Should it also apply that section to implicit factfindings? (3) By what standards are questions of credibility and conflicts in evidence to be resolved? (4) Should a court of appeals, reviewing a district court's decision on a habeas corpus petition, apply a different standard than would a

district court in determining the operative "facts"?

This case also presents a further and distinct question for resolution. That question concerns the due process standard by which identification evidence is to be judged when pretrial identification procedures involve the use of photographs. The Ninth Circuit held that the mere fact that photographic identification procedures were used weighed against the admissibility of eyewitness identification evidence. This addendum to the due process standard enunciated in this Court's prior cases finds support in neither those cases nor in the decisions of any other court. Certiorari should be granted so that the states can be certain of the appropriate due process standard and, if necessary, tailor their procedures to meet it.

ARGUMENT

I

THE NINTH CIRCUIT FAILED TO FOLLOW 28 USC § 2254(d) IN DETERMINING WHETHER THE STATE COURTS' FACTUAL FINDINGS WERE "FAIRLY SUPPORTED BY THE RECORD" OF THE STATE COURT PROCEEDINGS.

In its previous opinions in this case this Court attempted to interpret and give content to the congressional intent behind the enactment of 28 USC § 2254(d). The Ninth Circuit's most recent opinion demonstrates that further guidance from this Court is necessary and that this guidance can perhaps best be furnished by example -- the resolution of a particular case presenting many, if not all, of the common types of evidentiary questions which federal habeas courts reviewing state convictions will be called on to resolve.

This case is typical of perhaps the majority of criminal cases arising in a

prison context and certainly of many cases arising in other contexts. There were many witnesses. Not all of their testimony was consistent. As to particular witnesses there were sometimes inconsistencies and changes in testimony. In some instances reasons were offered which would tend to explain these inconsistencies and changes. In other instances no such reasons were offered. From this body of evidence the jury was required to determine the credibility of witnesses, to draw inferences and deductions and to make findings of fact. The state courts were required to make legal rulings based on a review of the record made in the trial court. So was the United States District Court when respondent filed his petition for habeas corpus. So was the Ninth Circuit when it was called upon to review the decision

of the district court -- thus becoming the fifth court to rule on this case.

Given the fact that this Court has already granted certiorari and issued opinions in this particular case on two previous occasions, the most recent opinion of the Ninth Circuit will certainly draw considerable attention from other courts and from counsel seeking an example of how the principles enunciated in this Court's prior opinions should be applied to a concrete case. The Ninth Circuit's most recent opinion fails in this role.

Given the nature and limits of a petition for writ of certiorari, we will give but a few examples of the practical problems which faced a court in the Ninth Circuit's position, some examples of the court's failure to recognize or properly deal with those problems, and

some examples of how the court's approach adversely affected the proper performance of its duty in this particular case and led it to an unwarranted result. These examples show that the Ninth Circuit's opinion is anything but a model of how a federal court of appeals should perform the delicate task of protecting the constitutional rights of a person convicted of crime while operating within the basic framework of our federal system.

28 USC § 2254, is the appropriate starting point of our analysis. Subd. (d) of that statute provides that a state court's determination, after a hearing on the merits, of a factual issue shall be presumed to be correct unless the applicant establishes, the respondent admits or it otherwise appears that the state court hearing was not a full or fair one

or the federal court, on consideration of the state court record as a whole, concludes that the record does not fairly support the state court's factual determination. This Court amplified the meaning of this provision in a recent case:

> "This deference [required by § 2254(d)] requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair[] support' in the record." Marshall v. Lonberger (1983) ____ U.S. ____, 103 S.Ct. 843, 850.

The Court also noted that, in cases where the state courts made no express findings with regard to credibility,

there were still ways for the federal courts to ascertain which witnesses and which testimony had been accepted. One such technique rests on the assumption that, absent evidence showing that the contrary is true, the state trier of fact applied correct standards of federal law to the facts. Id., citing Townsend v. Sain (1963) 372 U.S. 293, 314-315. Therefore, if it is clear that under the applicable federal law that the state court would have granted relief had it believed particular testimony, its failure to grant relief is tantamount to an express finding that the particular testimony was not credible. Id., see also LaVallee v. Delle Rose (1973) 410 U.S. 690.

This Court's holdings regarding the standards which federal habeas courts must apply in determining whether a state prisoner has been denied due

process by being convicted upon insufficient evidence may also help to resolve the questions of when and to what extent a federal habeas court must defer to factfindings by state courts. As explained by this Court:

> ". . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, <u>any</u> rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant

> has been found guilty of the crime charged, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." Jackson v. Virginia, (1979) 443 U.S. 307, 319 (citation and footnotes omitted).

Thus, the relevant question in such cases is not whether the federal court itself is convinced that the evidence met the appropriate legal standard. Id., at 319-319. Nor is it whether there is evidence in the record which would allow

the federal court to reach a conclusion different from that reached by the state court. Rather, the pertinent question is whether any rational trier of fact could have reached the conclusion it did.

In several of its previous cases involving claims that impermissibly suggestive pretrial identification procedures were used this Court has found that the relevant question is whether the record fairly supports the state court's factual determination. See Neil v. Biggers (1972) 409 U.S. 188, 200; Coleman v. Alabama (1970) 399 U.S. 1, 5-6. We submit that this is an appropriate general standard to be applied in this case. We further submit that, unless the record demonstrates that the state courts made particular findings to the contrary, conflicts in evidence and questions regarding the

credibility of witnesses should be resolved in favor of the express or implied findings of the state courts. Such a standard accords with the due process standard enunciated in Jackson v. Virginia, supra, and also with the terms of § 2254(d). The Ninth Circuit in this case certainly did not apply such a standard. Rather, it apparently assumed that it was at liberty to determine credibility and resolve conflicts in evidence and, if the conclusions of the state courts did not coincide with its own, to set aside those findings on the ground that they were not fairly supported by the record and therefore need not be accorded the presumption of correctness mandated by section 2254(d).

Several of the Ninth Circuit's findings of fact overlooked or rejected implicit state court factfindings of the sort mentioned in Marshall v. Lonberger

and LaVallee v. Delle Rose. Had the state courts accepted as true the particular evidence which the Ninth Circuit accepted then it is inconceivable that they would have allowed the identification evidence to be admitted. For example, the state Court of Appeal held that "the witnesses had an adequate opportunity to view the crime." Appendix A, pg. 8. Discussing witness Allen's "opportunity to view the criminal" the Ninth Circuit stated:

> "Allen testified that he didn't see who was fighting with Almengor. R.T. at 589, 796-97. Allen stood in front of and was preoccupied by another of the attackers, later identified as Vargas, who carried a large knife. At one point, this assailant lunged at Allen. R.T. at

614-616, 796. Allen backed up and then turned away from the right, yelling for help. R.T. at 628-29. 'It happened fast,' Allen testified. R.T. at 642. When he turned back around the three assailants had turned and were fleeing; he grabbed hold of the fatally wounded Arias and lay him down. R.T. at 629-30, 619-20. Allen later told an investigator for the defendants that he never got a good enough look at any of the assailants to identify them. R.T. at 1110." Appendix C, pgs. 8-9.

Later in its opinion the court stated:

"We conclude that, at least with respect to witness Allen, the witness had no opportunity to observe the assailant later

identified as Mata." Appendix C, pg. 26.

This amounts to a conclusion that any identification evidence concerning Mata given by witness Allen was an outright lie and should have been rejected by any rational trier of fact.[2/] But the record contains evidence that the witness made a positive in-court identification of Mata and that he testified that he saw three people standing near the door "jump" the victim (RT 585-587, 612). He testified that he saw enough of the three people to enable him to identify them (RT 636). This testimony was obviously accepted by the state courts. The witness' testimony that he could not tell who was

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2. Indeed, in view of this conclusion it is difficult to understand why the Ninth Circuit even discussed other circumstances concerning Allen's identification of Mata.

fighting with Almengor during the period while Almengor was engaged in a fight (RT 589, 796-797) was apparently read by the Ninth Circuit as an admission that he never saw that man at all during the entire incident. Therefore it is the Ninth Circuit's conclusion which is unsupported by the record. Perhaps more importantly the Ninth Circuit failed its duty under § 2254(d) of explaining precisely why it rejected the evidence which was obviously accepted as true by the state courts. Had it done this it is highly unlikely that it would have reached the conclusion it did.

Similarly, the Ninth Circuit apparently accepted at face value a defense investigator's testimony that Allen told him that he was not sure of the race of the individuals involved (RT 1118) and accepted that Allen's statement to the investigator was true (Appendix C,

pgs. 16, 31). The state courts obviously did not accept this testimony as embodying a true statement by Allen because if they had they would have found Allen's identification evidence to be unreliable. The Ninth Circuit failed its duty under § 2254(d) to explain why it chose to credit this evidence when the state courts did not.

The Ninth Circuit's opinion also demonstrates the existence of another type of error -- totally overlooking relevant facts contained in the state court record. For example, in discussing Allen's ability to identify Mata the court failed to mention the fact that Allen was acquainted with Mata before the incident by virtue of the fact that for a time they resided in the same dormitory at the prison (RT 595, 599). Such prior acquaintence should normally be an important factor in

determining whether a particular confrontation furnished a witness an opportunity to view the criminal which was adequate to permit later identification. The Ninth Circuit's opinion did not mention why its purported review of "the record as a whole" under § 2254(d) omitted reference to this important fact, regarding which there was no contradiction in the record.

The Ninth Circuit also did not explain the process by which it resolved particular points as to which there was conflicting evidence or evidence susceptible of two interpretations. Yet the court resolved such points in a manner which was at variance with the implicit (and on at least one occasion explicit) resolution of these points by the state courts. For example, the California Court of Appeal expressly found that "there is no showing of influence by

the investigating officers." Appendix A, pg. 8. In the portion of its opinion recounting the specific facts surrounding the identification procedures the court stated:

> "Almengor was interviewed and shown photographs on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentification of the other two participants." Appendix A, pg. 5 (emphasis added).

The Ninth Circuit's opinion, discussing the events of that date, states:

> "Almengor made a 'positive' identification of inmate Pete Nunez as one of the attackers." RT at 711. Appendix C, pg. 10 (emphasis added.)

Again, under the heading "Level of Certainty at Confrontation," the Ninth Circuit stated:

> "The only person Almengor identified 'positively' -- Pete Nunez -- was not even in the prison facility at the time of the attack." Appendix C, pg. 31 (emphasis added).

The record, however, contains evidence showing that on October 19, 1972, Almengor made a "positive" identification of Nunez only in that he gave prison authorities the name of an inmate (Nunez) which had been given to him by other inmates. It was only then that the authorities attempted to find a photograph of Nunez. When Almengor was shown the photograph: "He said it looked similar to the man he had seen or one of the men he had seen." (RT 711, Testimony of Correctional Lt. King; see also RT

398-401, Testimony of Almengor). However, the lieutenant's written report was apparently to the contrary (RT 733).

The Ninth Circuit's opinion contains no explanation why it rejected the sworn testimony of these two witnesses, rejected the express statement of the California Court of Appeal that the witness made a possible (as opposed to positive) identification of Nunez and rejected the California courts more general conclusion that there was no influence on the witnesses by the investigating officers. However, the Ninth Circuit's finding that a "positive" identification was made and then abandoned weighed heavily in its decision that impermissibly suggestive identification procedures occurred. Adherence to § 2254 should require it to explain precisely why it reached a finding on this point which was at odds

with that of the California courts and why the California court's finding, should not be accorded the presumption of correctness.

As an example of findings by the Ninth Circuit which are implicitly at variance with those of the state courts, and which disregard or disbelieve certain evidence in the record, we note the Ninth Circuit's "finding" that "Allen and Almengor were housed in segregation with the defendants and saw them taken to have their pictures retaken; Allen stated at one point that because of this he assumed the three defendants were participants in the stabbing. The Fifth District's finding that the record supports no showing that this action influenced the witnesses' identification is itself not fairly supported by the record in this case. 28 USC § 2254(d) (8)." Appendix C, pg. 42. The court did not explain why

it refused to believe particular testimony by the witnesses Allen and Almengor which the state courts apparently believed. Almengor testified that he saw only the "images" of three people leaving the segregation area and was unable to tell if Mata was one of the three (RT 444-446). Allen's testimony was to the same effect (RT 633-634). There was evidence of prior inconsistent testimony by Almengor and of a prior inconsistent statement by Allen regarding this matter. But the fact of inconsistency, without more, should not authorize the Ninth Circuit to make a de novo determination of credibility.

Similarly, we note the Ninth Circuit's "finding" that Allen made no identification of anyone until October 30, 1972, because he was "uncertain." Appendix C, pg. 32. Allen explained this by reason of the fact that he, as a

prisoner, was reluctant to involve himself with the incident (RT 650). The Ninth Circuit rejected this testimony without explaining why.

Furthermore, the Ninth Circuit rejected the state court's finding that the photographic identification procedures were inherently fair (Appendix A, pg. 8) holding that the fact that multiple photographic displays were shown to the two witnesses and that they made positive identifications only from the last one showed that their identifications were unreliable (Appendix C, pgs. 41-42). This conclusion overlooks considerable evidence to the effect that both witnesses believed the earlier photographs shown to them were inadequate to enable them to make a satisfactory identification and specifically requested that newer photographs be obtained (RT 715-716, 720-721). The Ninth Circuit

did not explain why it rejected this evidence.

As was noted earlier, we believe that there are other instances where the Ninth Circuit made factfindings at odds with both express and implicit factfindings made by the state courts which had support in the record. The foregoing examples are, we believe, sufficient to show the need for this Court to delineate standards by which the federal courts are to determine whether or not a state court record "fairly supports" the factual determinations of the state courts. These standards should include the applicable general test for the federal court -- is it whether there is support in the record for the state court's findings or, as the Ninth Circuit apparently concluded (Appendix C, pgs. 24-25), whether the federal court believes different findings are

proper and that those different findings are in turn "fairly supported by the record." The Court should also address whether only explicit fact-findings should be given deference or whether implicit findings should be given deference. The Court should also address the standards to be applied in resolving conflicts and inconsistencies in the evidence and in determining the credibility of witnesses. We submit that these elementary yet vital questions must be definitively resolved by this Court so that the federal courts can properly perform the delicate task entrusted to them by Congress when it enacted § 2254.

There is a further question presented by this case which was not addressed, much less resolved, by the Ninth Circuit. That question concerns the standard which a federal court of appeals should apply in reviewing the judgment of a federal

district court on a petition for a writ of habeas corpus by a state prisoner. To make its decision the district court necessarily had to reach its own conclusions as to what the evidence in the record showed the facts to be. But the Ninth Circuit's opinion did not mention the work of the district court and appeared to apply a standard which was indistinguishable from that which would be applied by a district court. Judge Sneed, in his dissent, noted this fact, stating:

> "The district court's findings were on a mixed question of law and fact. Mata II, 102 S.Ct. at 1306. As such, they are entitled to deference on our part. At the moment, we apply a 'clearly erroneous' standard of review to a district court's finding

in a mixed question of law and fact. Maxwell v. Sumner, 673 F.2d 1031, 1035-36 and n. 5 (9th Cir. 1982).

"The majority does not address the standard of review of the district court opinion, and therefore does not explain why it has chosen not to defer to the district court. It should have done so." Appendix C, dissenting opinion at p. 44.

This observation by Judge Sneed points up another distinct yet related question regarding which the guidance of this Court is sorely needed.

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II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE MERE FACT THAT PHOTOGRAPHIC IDENTIFICATION PROCEDURES WERE USED WEIGHS AGAINST THE ADMISSIBILITY OF EYEWITNESS IDENTIFICATION EVIDENCE.

In its first two opinions in this case, the Ninth Circuit was of the view that the necessity for the use of photographic identification procedures should be determined in every case in which they were employed and that lack of necessity was an important factor weighing against the admissibility of such evidence. Mata v. Sumner, supra, 611 F.2d at 757; Mata v. Sumner, supra, 649 F.2d at 714. One of the questions presented in the first two petitions for certiorari in this case was the correctness of the Ninth Circuit standard for determining the admissibility of identification evidence in a case where photographic identification procedures had

been used. This issue was not decided by this Court in its two earlier opinions because it vacated the judgments of the Ninth Circuit on other grounds and remanded the matter to that court for further proceedings. In a dissent to this Court's most recent opinion in this case, Justice Stevens recognized that:

> "Lurking in the background of this case is the question whether the failure to conduct a lineup has any bearing on the validity of a photographic identification. The Court may one day confront that question." 455 U.S. at 600.

We again ask this Court to confront that question, though the context in which we make this request has changed since the issue was last presented.

In its most recent opinion the Ninth Circuit, without expressly overruling

its earlier cases, finally acknowledged that, in requiring the exclusion of identification evidence that results from suggestive identification procedures, the due process clause protects solely an evidentiary interest (Appendix C, pg. 37) and that "'reliability is the linchpin in determining the admissibility of identification testimony . . . .'" Appendix C, pg. 38. In an earlier portion of its opinion the court summarized its ultimate conclusion in the following language:

> "Our review of the trial court's admission of in-court and out-of-court identification testimony must focus exclusively on the reliability of the identifications in light of the totality of surrounding circumstances." Appendix C, pg. 24 (citations omitted).

But then, inexplicably, in the same paragraph in which it abandoned the concept of "necessity" as part of the test for determining the admissibility of identification evidence, the court added:

> "This does not mean, however, that we cannot consider the <u>fact</u> that the officers chose to use a less reliable identification procedure (e.g., photographic array) over a normally more reliable procedure (e.g., corporeal line-up). The mere fact that a less reliable method was used clearly bears on the extent of the corruptive effect of the identification procedure." Appendix C, pg. 39 (citations omitted).

The court therefore concluded that:

> ". . . [W]e find only that [photo arrays'] relative

> unreliability in comparison with line-ups is a factor to be considered in the totality of the circumstances." Appendix C, pgs. 40-41.

Thus, the wild card of "necessity" has been abandoned (at least in this case) as part of the test for determining the admissibility of eyewitness identification evidence. But it has been replaced by a new element which has no more bearing than did the element of "necessity" on the crucial questions of whether a particular defendant's evidentiary interests have been violated or whether particular identification evidence is reliable.

It is not surprising that the Ninth Circuit cited no authority for its conclusion that the mere fact that photographic identification procedures were used was itself a factor, to be

weighed in connection with the other facts and circumstances of the case, in determining whether particular identification evidence should be excluded. Nor is it surprising that the court could find no authority for its conclusion that use of photographic identification procedures (as opposed to corporeal line-up procedures), necessarily detracts from the admissibility of resulting identification evidence in every case. There is no such authority. The Ninth Circuit cites only general language in Simmons v. United States (1968) 390 U.S. 377, to the effect that corporeal identifications are "normally more accurate" than photo identifications, Id., at 386, n. 6, and that there is always a danger that a witness may make an incorrect identification even if "the most correct photographic identification procedures" are used. Id., at 383. But Simmons did not hold that

identification evidence resulting from photographic identification procedures is to be judged by any more stringent standard than is identification evidence resulting from other procedures. Simmons recognized that a due process claim "must be evaluated in light of the totality of surrounding circumstances," Id., at 383, that "each case must be considered on its own facts," Id., at 384 and that convictions based on eyewitness identification at trial following a pretrial identification from photographs will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. Id.

This Court's subsequent cases should have made it clear to the lower federal courts that the type of pretrial identification procedure used makes no

difference in the standard to be applied in determining whether admission of identification evidence violates a defendant's due process rights. They should also have made it clear that each case must be decided on its own facts and that generalities are of no assistance in deciding particular cases. For example, in United States v. Ash (1973) 413 U.S. 300 this Court held that a defendant is not entitled to the assistance of counsel at a photo display conducted by the government for the purpose of allowing a witness to attempt an identification of the offender. The Court noted that the other incidents of the adversary process acted as a sufficient safeguard for the defendant's interests. In the course of its opinion the court stated:

> "We are not persuaded that the risks inherent in the use of photographic displays are so

> pernicious that an extraordinary system of safeguards is required." Id., at 321.

Neil v. Biggers (1972) 409 U.S. 188 and Manson v. Brathwaite (1977) 432 U.S. 98 both stress that each case must be decided on the totality of the circumstances and on its own facts. Manson, which involved the use of a single photograph of the defendant, did not suggest that the mere fact that photographic identification procedures were used was a fact militating against admission of identification evidence. Nor did it suggest that, because of the fact that photographic identification procedures were used, a standard different from that enunciated in Neil (which primarily involved a physical showup) should be employed. In fact, Manson rejected a "per se" approach which focused on the procedures employed

and required exclusion of out-of-court identification evidence whenever it was obtained through unnecessarily suggestive confrontation procedures. Id., at 110 et seq. Rather, the Court stressed that the ultimate standard was due process fairness and that a "totality of the circumstances" approach best served the limited evidentiary interest protected by the due process clause. Id., at 113.

Thus, the Ninth Circuit has instituted a form of the "per se" approach specifically rejected by this Court in Manson. Determination of the admissibility of identification evidence has commonly been viewed as a fact-oriented balancing process, in which the facts and circumstances of the particular case are of paramount importance. Until now most courts have concluded that generalities do not help them to decide particular cases. But now the Ninth Circuit

has injected a generality into any case involving the use of photographic identification procedures. Use of such procedures is disfavored to the extent that at the outset there are now one (or perhaps two) strikes against the admissibility of identification evidence in cases where photographic identification procedures were used. This rule is not characterized as a rule of procedure but, rather, as a constitutional imperative, binding on the states under the due process clause. We submit that there is no basis in law or in logic for this novel constitutional rule. This Court should grant certiorari to clarify the appropriate constitutional standard to be applied in determining the admissibility of eyewitness identification evidence when it has been preceded by the use of photographic identification procedures.

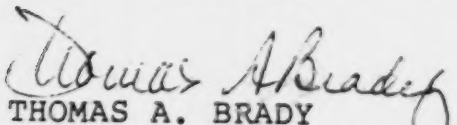
CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of ceriorari should be granted.

DATED: April 19, 1983

JOHN K. VAN DE KAMP
Attorney General

GLORIA F. De HART
Deputy Attorney General



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APPENDIX A

APPENDIX A

In the Court of Appeal
State of California

Fifth Appellate District

5 Crim. 1735
(Sup.Ct.No. 15771)

The People,	)
Plaintiff and Respondent,	)
vs.	)
Salvadore Vargas, David Gallegos, and Robert Mata	)
Defendants and Appellants.	)

[Filed Aug. 4, 1975]

OPINION

APPEAL From a judgment of the Superior Court of Kern County. P. R. Borton, Marvin E. Ferguson and John M. Nairn, Judges. Affirmed.

Douglas J. Morgan, under appointment by the Court of Appeal, for defendant and appellant Salvadore Vargas.

C. Michael Farmer, under appointment by the Court of Appeal, for defendant and appellant Salvadore Vargas.

Jim D. Mills, under appointment by the Court of Appeal, for defendant and appellant Robert Mata.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Arnold O. Overoye, Joel Carey and Anthony L. Dicce, Deputy Attorneys General for plaintiff and respondent.

Appellants herein, Salvadore Vargas, David Gallegos and Robert Mata, were tried jointly and were found guilty of murder in the first degree. All three were sentenced to state prison for the term prescribed by law. All three filed separate appeals, the contentions in which are treated here together.

FACTS

On October 19, 1972, inmate Leonard Arias was stabbed to death in a dormitory

at the California Correctional Institution at Tehachapi. At approximately 1:30 p.m. of that day, Arias, one Rigoberto Almengor and one Jay Allen, all inmates of the institution, were drinking coffee and talking near Allen's bunk in Dormitory Eight. A call over the institution's loud speaker ordered all new arrivals to report to the laundry room. Arias had just arrived at the institution from San Quentin Prison the previous day and the three men thereupon proceeded to the laundry room.

On the way to the laundry room they passed three men who were standing by the bulletin board. These three men then turned and attacked the victim Arias. During the attack, Arias was stabbed with a knife several times, causing his death.

Each of the appellants denies partaking in the attack and subsequent killing; and each produced evidence tending to show that he was at another place in the prison at the time of the incident in question.

Multiple issues are raised by the respective appellants and assigned as prejudicial error requiring reversal of the judgment.

I. The Photographic Lineup Procedure.

Both appellants Gallegos and Mata contend that there were prejudicial errors in the pretrial identification of them by certain prosecution witnesses.

Three inmate witnesses testified that they saw the stabbing take place. All three -- Childress, Almengor, and Allen -- identified all three defendants; but their testimony is attacked by appellants Gallegos and Mata on the basis of

claimed improper pretrial photographic identification procedures. The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. On that date Childress also selected all three appellants from photographs shown to him.

Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identification by this action of the investigating officers.

It is established that the safeguards set forth in United States v. Wade, 388 U.S. 218 and Gilbert v. California, 388 U.S. 263 do not apply to pretrial photographic identification of a suspect. (People v. Lawrence, 4 Cal.3d 273.)

The Lawrence case followed the decision by the United States Supreme Court in Simmons v. United States, 390 U.S. 377,

which reached a similar result. Both courts reasoned that particularly where the photographs from which the witness made his identification were preserved and available at trial, as was the situation in the case at bench, counsel for the accused can easily reveal the possibility of prejudice by using the photographs in cross-examination. (Simmons v. United States, supra, 390 U.S. at 384; People v. Lawrence, supra, 4 Cal.3d at 278-279.) Both courts have determined that each case must be considered on its own facts, and that a violation of due process occurs and a conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (See Simmons v. United States, supra, 390 U.S. at 384;

People v. Lawrence, supra, 4 Cal.3d at 280.)

Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.

II. Denial of Discovery

All three appellants contend that the trial court abused its discretion in denying a motion for additional discovery.

At the commencement of the trial, counsel for the defendant Gallegos, Mr. Simrin, renewed a motion for discovery which had been made before another department of the court previously, and had been continued generally for hearing before the trial judge. This motion had been instituted by a notice in writing, coupled with the declaration of the attorney, and requested information from the Department of Corrections concerning (1) records and reports concerning the membership or non-membership of one Ortega, a prospective prosecution witness, in the Mexican Mafia; and (2) records and reports concerning the membership or non-membership of the three defendants; and (3) a list of all those persons alleged to have been members of the Mexican Mafia as of October 19, 1972. Counsel for the other defendants joined in the motion.

Subsequently, at an in-chambers conference prior to trial, the motion was limited to records concerning the witness Ortega; all counsel agreeing that if this witness were not called there would be no reason to urge the motion.

Thereafter, the desired files of the Department of Corrections were obtained, and an in camera hearing was held wherein the material was found to be of a privileged nature and it was further found by the judge that the privilege outweighed any probative value the evidence may have to the defense. Although the judge did disclose certain information in the file to counsel for the defendants, he found that the balance of the file was privileged and in any event contained no further material of any probative value to the defendants. After the court had announced its decision, counsel for one

of the defendants moved for further discovery on the file. The court denied the motion, and refused to permit counsel to state a reason for the further discovery for the record.

Absent some governmental requirement that information be kept confidential, the accused in a criminal trial is generally entitled to have access to all evidence in the hands of the prosecution or in possession of other agencies which are part of the criminal justice system and which can throw light on the issues in the case. (People v. Riser, 47 Cal. 2d 566; Engstrom v. Superior Court, 20 Cal.App.3d 240.) It is therefore necessary to inquire whether the type of information sought to be discovered in the instant case is confidential,

official information.[1/]

Section 1040 of the Evidence Code governs the disclosure of "official information". It provides, in part, as follows:

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1. We are not unmindful of the cases of Procunier v. Superior Court (Losoya), 35 Cal.App.3d 207 and Procunier v. Superior Court (Herth), 35 Cal.App.3d 211, which hold that almost identical information was absolutely privileged under the provisions of Government Code section 6255.

These decisions, however, ignore section 6260 of the Government Code, which provides:

> "The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state." (Emphasis added.)

It thus appears that section 6255 of the Government Code is not applicable to these proceedings, and for this reason we do not feel bound by these decisions.

"(a) As used in this section 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

"* * *

"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the

necessity for disclosure in the interest of justice . . ."

A provision for determination of a claim of privilege by the court is set forth in section 915 of the Evidence Code. This section provides as follows:

"(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.

"(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court

may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

Thus, provision is made for an *in camera* hearing before the judge alone, with only the objecting party present, when the claim of privilege is raised.

Evidence Code section 1042(a) provides for sanctions upon the public entity invoking the privilege where necessary. It states as follows:

> "(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material."

The Supreme Court has pointed out, in Pitchess v. Superior Court (Echeveria), 11 Cal.3d 531, 540, the results of the legislative enactment in

the Evidence Code, as follows:

"Evidence Code section 1040, therefore, represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. Evidence Code section 1042, subdivision (a), in turn, codifies the due process demand recognized by the United States Supreme Court that the prosecution cannot commence criminal proceedings 'and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.' [Citations omitted.] In concert, the two provisions create an orderly and fair procedure designed to safeguard the legitimate interests of both the government and criminal defendants."

It is thus clear that there should be an in camera hearing wherein the trial judge examines the requested evidence when the privilege is invoked.

There is, however, a conflict amongst the cases as to whether or not an adversary hearing is necessary after the in camera examination of the evidence. In People v. Superior Court (Biggs) 19 Cal.App.3d 522, in a well reasoned opinion the court held that the in camera hearing provided by section 915(b) is merely a preliminary inquiry to acquaint the judge with the public necessity of confidentiality; that thereafter, the other Evidence Code sections requiring a preliminary determination of the foundational facts come into play, and that an adversary hearing should be held outside the presence of the jury to determine the necessity of the defendant for the

information and the judge should then balance such necessity against the public necessity of confidentiality. At such hearing, the court points out, consideration of alternative evidence offered by the state could be given, and the needs of the defendant might even be satisfied in whole or part without destroying the confidentiality of the files.

In People v. Woolman, 40 Cal.App.3d 652, the court took a contrary view, referring to the language of Biggs, supra, as dicta and indicating the court's opinion that such a procedure would destroy the privilege the hearing is designed to protect. The court held nothing more than an in camera examination of the evidence is required.

Clearly there was no error here if we follow the precepts of Woolman.

We also find that in Biggs the court states (page 532):

> "In weighing the defendant's need, the court was not to pass upon the veracity of his claim, but only to ascertain if a reasonable possibility existed that the requested information might exonerate him."

In the instant case, it is clear that the sole purpose of the requested information was in connection with the testimony of the witness, Ortega.[2/]

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2. At the commencement of the trial, the following colloquy took place between counsel for the defendant Gallegos, who made the original motions, and the court:

"* * *

"THE COURT: Let me interrupt you for a moment. I am making the statement not as fact, but to elicit information if it is inaccurate. This whole matter turns really over a witness -- Carlow Martin Orgeta --

"Mr. Simrin: Correct.

(Footnote 2 continued on next page)

Thus the only purpose of the evidence could have been for impeachment of one witness; in Biggs, the purpose was to exculpate the defendant by showing that at the time of the alleged offense, the defendant was acting as an informant and was an active undercover operator for the Bureau of Narcotics Enforcement.

It is obvious that under any interpretation of the facts, the required records in this case did not bear on the

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(Footnote 2 continued)

> "THE COURT: Well, if that witness were not called, then there is really no serious reason for you to urge your motion.
>
> "Mr. Simrin: That is correct. And if the witness is not called, on behalf of Defendant Gallegos, I would withdraw my motion.
>
> "THE COURT: That's what I gather from your documents. I want to be sure I am correct.
>
> "* * *"

issue of guilt or innocence, but only on the impeachment of a single witness. Therefore, even under the rule enunciated in Biggs, there is no error requiring a reversal here.

Furthermore, the evidence in the instant case is overwhelming, with several eye witnesses as well as physical evidence pointing to the guilt of the defendants. Any error was therefore harmless. (Chapman v. California, 386 U.S. 18; People v. Stout, 66 Cal.2d 184).

III. The Aranda Rule

Appellants Mata and Vargas claim error in permitting into evidence the testimony of one Carlos Ortega concerning a conversation with their codefendant Gallegos. In this testimony Gallegos referred to "we", "they", and "them", presumably meaning Mata and Vargas as well as himself, in connection

with various aspects of the stabbing. Later Gallegos wrote a note to Ortega saying that they did their job and took pride in themselves; here Gallegos allegedly mentioned Mata and Vargas by name.

No admonition restricting this testimony to the defendant Gallegos was given by the trial judge and no cautionary instruction was given the jury that testimony could be used against that defendant only.

People v. Aranda, 63 Cal.2d 518, 530, established the rule that when the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court may either (1) permit a joint trial if deletions are made as to all implications of the codefendant; or (2) grant a severance of trials;

or (3) exclude the testimony. However, it has subsequently been made clear by the cases that the failure to object and assert one's Aranda rights at trial constitutes a waiver of those rights. People v. McGautha, 70 Cal.2d 770, 785; People v. Terry, 38 Cal.App.3d 432, 443.

In the present case, the only objections to Mr. Ortega's testimony were upon grounds other than Aranda violations. Thus, appellants have waived any Aranda rights they may have possessed.

Furthermore, it appears that any adverse implications of these extra-judicial statements were ambiguous at best. Thus, even if appellants had preserved their rights on appeal by virtue of a timely objection, it is questionable whether the provisions of Aranda would be applicable. And even if Aranda did apply, the evidence so overwhelmingly

pointed to appellants' guilt, that any error would be harmless. Harrington v. California, 395 U.S. 250, 252-254 (1969); Chapman v. California, 386 U.S. 18, 24 (1967); People v. Epps, 34 Cal.App.3d 146.

We accordingly find no reversible error here.

IV. Failure to Instruct on Statements of Coconspirator.

The statements made by appellant Gallegos (hereinbefore referred to) were admitted on representations of the prosecuting attorney that a conspiracy existed.

Appellants Vargas and Mata contend that in admitting into evidence these statements as an exception to the hearsay rule, the court should have instructed the jury on the law pertaining to the testimony of a coconspirator, sua sponte. No such instructions were requested by appellants at the trial.

Appellants contend that the giving of the appropriate conspiracy instructions would have required the jury to determine whether there was in fact a conspiracy and that appellant was a member of it before the jury could consider the incriminating statements by codefendants to implicate appellant; they further contend that existence of a conspiracy is a preliminary fact that must be found by the trial court before statements made during such conspiracy are admissible. (Evidence Code section 403; People v. Goldberg, 152 Cal.App.2d 562.)

But appellants have made no showing that a sua sponte instruction is required. Even in the analogous situation involving the duty to instruct as to the utilization of accomplice testimony, not all failures to so instruct

constitute reversible error (People v. Gordon, 10 Cal.3d 460, 470-473). In such case a miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appellants would have been reached in the absence of error. (People v. Gordon, supra, at 470.)

In this case, other evidence sufficiently pointed to the guilt of all three appellants. Eyewitness testimony placed all of the appellants at the scene of the murder and participating in it. Physical evidence, including gloves, a knife, and a jacket with blood on it were found. Statements of various defendants were included in the testimony. After an examination of the entire cause, including the evidence, the court is of the opinion

that it is not reasonably probable that a result more favorable to appellants would have been reached had the court given the conspiracy instruction.

Thus any failure on the part of the trial court to instruct sua sponte did not substantially prejudice appellants and was not reversible error.

V. Claims of Error in Admission of Evidence.

Various alleged errors in the admission of evidence are cited as gounds for reversal. Appellant Gallegos claims error in the receipt of evidence relating to the Mexican Mafia and Nuestra Familia was prejudicial. He concedes that evidence relating to the existence of these two prison groups was proper; he contends, however, that the trial court committed reversible error in permitting testimony as to activities of

these organizations relating to acts of violence occurring at other institutions in which appellant was not involved.

The activities of the rival inmate factions were the basis of showing motive in the prosecution's case. In connection with these activities, it was within the sound discretion of the trial court to admit evidence of the nature of the group and the nature of their activities in general in institutions; absent this latter evidence, testimony as to their existence would be meaningless. The admission of such evidence being within the sound discretion of the trial court, it will not be disturbed on appeal absent a showing of abuse of such discretion. (People v. Archerd, 3 Cal.3d 615.)

Appellant Mata contends that the trial court erred in admitting the hearsay evidence of one Albert Mills, who

testified as to statements another witness, inmate Childress, made prior to trial concerning the fact that he had witnessed a killing and feared for his life. Immediately thereafter Childress identified the defendants as the perpetrators from photographs. Evidence of such a statement was admitted to corroborate identification at the trial, and also as independent evidence of identification at the trial, and also as independent evidence of identification. This was proper pursuant to Evidence Code section 1238.[3/] (People v. Gould, 54 Cal.2d 621, 626; People v. Imbler, 57 Cal.2d 711, 716.)

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3. Evidence Code section 1238 provides:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have

(Footnote continued on next page)

VI. Misconduct of Prosecutor.

Appellant Mata contends that the prosecuting attorney was guilty of prejudicial misconduct in asking the witness Schoo on cross-examination, "Isn't it a fact that you used to carry his shank for him?" Schoo was an alibi witness for the defendant Mata. No objection to the question was made at the time it was asked.

(Footnote 3 continued)

been admissible if made by him while testifying and:

> "(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
>
> "(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
>
> "(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

It would appear that the question was appropriate in order to show bias on the part of the witness. No claim of dishonesty or deception on the part of the prosecutor is made (See People v. Beivelman, 70 Cal.2d 60, 75-77). We find no basis for the claim of misconduct.

The judgment is affirmed.

/s/ GINSBURG, J.*

We concur:

/s/ BROWN (GEO. A.), P.J.

/s/ GARGANO, J.

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*Assigned by Chairman of Judicial Council.

APPENDIX B

APPENDIX B

In The United States District Court

For the Northern District of California

No. C-77-2801 SAW

Robert Mata,

Petitioner,

vs.

George Sumner,

Respondent(s).

[Filed May 23, 1978]

JUDGMENT

In accordance with the accompanying order,

IT IS HEREBY ADJUDGED that the petition for habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL
Judge

In The United States District Court

For the Northern District of California

No. C-77-2801 SAW

Robert Mata,

Petitioner,

vs.

George Sumner,

Respondent(s).

[Filed May 23, 1978]

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

Robert Mata, imprisoned in San Quentin State Prison, Tamal, California, has petitioned for habeas corpus. An Order to Show Cause was filed on January 19, 1978, and a Return to said Order was filed on February 28, 1978. Petitioner filed a Traverse on April 4, 1978. Both parties have filed additional memoranda.

Respondent's first contention is that petitioner's claim cannot be addressed on the merits because he failed to raise some of them in the state courts. Wainright v. Sykes, 433 U.S. 72 (1977). While it is true that petition did not raise all his claims on direct appeal to the state courts, he did raise his other claims in a petition for state habeas corpus. While that petition was denied without opinion, for purposes of habeas corpus review it is assumed that the state court addressed the merits of the petition. Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976). Thus petitioner has raised all the issues now raised in this proceeding to the California courts. Wainwright is therefore inapplicable.

On the merits, the Court concludes that the petition must be denied. While

petitioner has established that irregularities occurred in the pre-trial photographic identification of petitioner by witnesses Almengor and Allen, these irregularities did not so taint the in-court identifications of petitioner by these witnesses as to establish a constitutional violation under Simmons v. United States v. Baxter, 492 F.2d 150, 172 (9th Cir. 1973), cert.denied, 414 U.S. 801 (1973), 416 U.S. 940 (1974). Moreover, even if the testimony of Allen was tainted, the positive identification of petitioner by witness Childress and the strong one by Almengor makes the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Petitioner's argument that he did not receive effective assistance of counsel is predicated solely upon what he conceives to be the egregious constitutional

violation involved in the photo-identification procedure. Inasmuch as petitioner's claim is at best arguable, his counsel was not incompetent in failing to seek suppression of petitioner's in-court identification, whichever standard of competency is employed. DeKaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976) (en banc), cert.denied, 429 U.S. 1075 (1977). It is therefore unnecessary to consider which standard the Ninth Circuit will ultimately choose for determining the competency of counsel. Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), petition for rehearing en banc granted.

Petitioner's final argument, that the California Court of Appeal lacked an adequate record before it to enable it to review petitioner's appeal, also lacks merit. Petitioner was entitled to

a record of sufficient completeness to enable the appellate court to find error, if there was error, in the proceeding below. Draper v. Washington, 372 U.S. 487, 497-98 (1963). That is precisely what petitioner received.

IT IS THEREFORE HEREBY ORDERED that the petition for writ of habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL

Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT MATA, Petitioner-Appellant, v. GEORGE W. SUMNER, Warden of the California State Prison at San Quentin, Respondent-Appellee.	)	No. 78-2636 D.C. No. C-77-2801-SAW OPINION On Remand [Filed Jan. 20, 1983]

Appeal from the United States District Court for the Northern District of California

Stanley A. Weigel, District Judge, Presiding

Before: ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge

ELY, CIRCUIT JUDGE:

Robert Mata appeals from the District Court's denial of his Petition for Writ of Habeas Corpus. The Petition followed Mata's murder conviction in California state court and his exhaustion of

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*The Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

all available state court remedies. We reverse.

In this opinion we endeavor for the third time to set forth the factual and legal bases for our firm conclusion that impermissibly suggestive pretrial photographic identification procedures violated Mata's constitutional right to due process of law. The United States Supreme Court vacated and remanded our initial disposition, Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979), citing our failure to apply the presumption of correctness mandated by 28 U.S.C. § 2254(d) to the factual determinations made by the California Court of Appeal in this case. Sumner v. Mata, 449 U.S. 539, 547 (1981). On remand we considered the state court's factual determinations in the context of 28 U.S.C. § 2254(d) and concluded that, because we "substantially agree[d]" with the historical or basic facts adduced by

the California court, the requirement of explaining by reasoned written references the justification for dispensing with the presumption was inapplicable. Mata v. Sumner, 649 F.2d 713, 715-16, 717 (9th Cir. 1981). See Sumner v. Mata, 449 U.S. at 549. The Supreme Court again vacated and remanded, citing our failure to heed the Court's earlier conclusion that certain of our factual findings were "considerably at odds" with the findings made by the state appellate court. Sumner v. Mata, 102 S. Ct. 1333, 1305, 1307 (1982) (per curiam).

Having received additional briefing by the parties, we now attempt to review carefully the facts of this case, as reflected in the trial transcript and the findings of the California Court of Appeal, in compliance with 28 U.S.C. § 2254(d) and the most recent mandate of

the Supreme Court. In doing so we emphasize that the Court has not reached the merits of our prior conclusion that the pretrial photographic identification procedures were so impermissibly suggestive in this case as to give rise to a very substantial likelihood of irreparable misidentification. See 102 S. Ct. at 1307; 449 U.S. at 552. Our reevaluation of the facts only strengthens our conviction that the state has denied Mata that fairness required by the Due Process Clause of the Fourteenth Amendment. See Manson v. Brathwaite, 432 U.S. 98, 113 (1977).

II

On October 19, 1972, inmate Leonard Arias was stabbed to death in a dormitory at the California Correctional Institution at Tehachapi, California. People v. Vargas, 5 Crim. 1735, slip op. at 2 (Cal. Ct. App. Aug. 4, 1975) (unpublished

opinion by the Fifth Appellate District on Mata's direct appeal after trial) [herinafter cited as Fifth District Opinion]; see Reporter's Transcript of Trial ("R.T.") at 365-96, 582-630 (eye-witness description of the incident). Three inmates were charged with the murder: Mata, David Gallegos, and Salvador Vargas. Each denied partaking in the attack and each produced evidence tending to show that he was at another place in the prison at the time of the attack. Fifth District Opinion at 2. The prosecution elicited testimony that the murder was the result of feuding between opposing prison factions--the "Mexican Mafia" and the "Nuestra Family." See R.T. at 805-51 (testimony of member of Mexican Mafia). The victim, Arias, was reputed to be a member of the Nuestra Family who had allegedly previously attacked a member of the

Mexican Mafia during his term at San Quentin, another California prison facility. See id. Arias had arrived at Tehachapi the day before he was killed. Fifth District Opinion at 2.

A.

At about 1:30 p.m. on October 19, Arias and fellow inmates Rigoberto Almengor and Jay Allen were drinking coffee and talking near Allen's bunk in Dormitory Eight. Fifth District Opinion at 2; R.T. at 365-69, 582-84. A call over the institution's loud speaker ordered all new arrivals to report to the laundry room and, since Arias was a new arrival, Allen and Arias proceeded to the laundry room. Fifth District Opinion at 2; R.T. at 372-73, 584-85. Almengor, after starting to walk to the television room, decided to join Arias and Allen after Allen asked him to come along. R.T. at 372-73, 585.

On the way to the laundry room they passed three men who were standing by the bulletin board. These three then turned and attacked Arias. During the attack Arias was stabbed with a knife several times, causing his death. Fifth District Opinion at 2. Almengor testified that he was walking about even with Arias when the three men at the bulletin board area "turned around real fast" and began attacking Arias. R.T. at 373-74, 376. Almengor thought he should help Arias and approached the assailants. R.T. at 379, 393. The man Almengor later identified as Mata "slooped" away from attacking Arias and came at him with a knife. R.T. at 392, 747. Almengor and this man struggled for a few seconds, R.T. at 960, 747, 381. Almengor threw a kick at him, R.T. at 747, 380, and then they both backed off each other. R.T. at 381, 747. The two then stood looking

directly at each other, eye-to-eye, about six feet apart, for "several seconds, several minutes." R.T. at 381-82, 742, 747-49, 960. Almengor, who is near-sighted, was not wearing his glasses at the time, R.T. AT 449-50, but he testified that he didn't need them for the distance involved in the attack, R.T. at 489-91.

Allen testified that the didn't see who was fighting with Almengor. R.T. at 589, 796-97. Allen stood in front of and was preoccupied by another of the attackers, later identified as Vargas, who carried a large knife. At one point, this assailant lunged at Allen. R.T. at 614-16, 796. Allen backed up and then turned away from the fight, yelling for help. R.T. at 628-29. "It happened fast," Allen testified. R.T. at 642. When he turned back around the three assailants had turned and were fleeing;

he grabbed hold of the fatally wounded Arias and lay him down. R.T. at 629-30, 619-20. Allen later told an investigator for the defendants that he never got a good enough look at any of the assailants to identify them. R.T. at 1110.

B.

Prison investigators interviewed Allen and Almengor on several occasions after the stabbing, each time employing photographic arrays in an attempt to obtain an identification of the attackers.

October 19

Correctional Lieutenant Robert King and Investigator Maurice Higgins interviewed Almengor at about 5:00 p.m. on the day of the incident. Almengor asked to see photographs of all the Mexican-American inmates in the facility; Lieutenant King showed him between two and five hundred mug shots of prison inmates. R.T. at 397, 285-86, 422, 739.

Almengor made a "positive" identification of inmate Pete Nunez as one of the attackers. R.T. at 711. The record is conflicting as to whether Almengor named Nunez before or after he was shown Nunez' photograph. See R.T. at 398-400, 420, 707-19, 730-38. Lieutenant King told Almengor that Nunez could not have been involved in the incident because Nunez was not in the prison at the time of the stabbing. R.T. at 713. Almengor made a "possible," "tentative," but "never positive" identification of three to seven other inmates pictured in the mug shots. R.T. at 401-02, 432, 437-38, 712, 730-38. One of these was Vargas; also included were inmates Pete Ramirez and Jay Reymundo. Fifth District Opinion at 3; R.T. at 734. Almengor did not identify Mata as a participant. Id. Although Almengor requested to see the inmates in

a line-up, a line-up was never held. R.T. at 781.

Lieutenant King and Officer Higgins also interviewed Allen on this date, but they did not show him any photographs. R.T. at 719-20. Allen said he could make no identification of the participants in the attack. R.T. at 720.

October 27

Almengor was shown a group of 24 photographs of inmates, including photographs of the three defendants. R.T. at 714-15. The defendants' photographs had been taken three to eight months earlier. R.T. at 917-18. Many of the other photographs in the array were considerably older--some as many as three, four, and even eight years old. R.T. at 918. Outside of Allen's presence, Almengor "possibly" identified Vargas, but it wasn't a "positive" identification. R.T. at 715. Again he failed to

identify Mata. R.T. at 916. Almengor complained that the photographs were too old and requested up-to-date photographs. R.T. at 716, 916. Also, he repeated his request to see the inmates in a line-up. R.T. at 425, 496-97, 783, 932, 959.

Allen was shown the same group of photographs, but he did not identify anyone. Fifth District Opinion at 3; R.T. at 720-21. Like Almengor, he said the photographs appeared old. R.T. at 721.

October 27-October 30

Prison authorities shot new photographs of a number of inmates, including the defendants, but they were not useable because of photographer error. R.T. at 716. The photographs of the three defendants were the only ones taken a second time. R.T. at 754. Allen and Almengor, who were housed in segregation together with the defendants and other inmates, saw the three defendants being taken to

have their photographs retaken. R.T. at 444-46, 634, 1118-19. Almengor testified that he could not tell who the three men were but that he knew they were being taken to have their pictures retaken. R.T. at 444-46. However, Almengor said he knew that one of the three was defendant Gallegos. R.T. at 452. Allen told an investigator for the defendants that he recognized the three defendants as they were taken out and that, since they were the only ones in segregation to appear in the photographic array on October 30, he assumed "they must be the ones that did it." R.T. at 1118-19. At trial, however, he testified that he did not remember making such a statement. R.T. at 634. Moreover, while in segregation, both Allen and Almengor had spoken with Gallegos. R.T. at 443, 633.

October 30

Lieutenant King showed Almengor a group of 15 inmates photographs, including the new photographs of the three defendants. Fifth District Opinion at 3; R.T. at 716. The defendants' photographs were dated October 27, 1972; the others were older--some as many as two years old. R.T. at 755-56. Not included in this group were the photographs of Ramirez, Reymundo, and Nunez. R.T. at 717-18. Almengor identified, without qualification, the photographs of Mata, Gallegos, and Vargas as being photographs of the assailants. Fifth District Opinion at 3; R.T. at 718, 741. Allen was then brought into Lieutenant King's office and, with Almengor at the other side of the room, Allen also identified the three defendants as the assailants. Fifth District Opinion at 3; R.T. at 447-48, 732. Allen was not advised that

Almengor had selected the same three photographs. R.T. at 722.

C.

During a taped portion of the interview on October 27 Almengor described the three assailants for Lieutenant King and Officer Higgins. R.T. at 969-71. He stated that they wore state-issued jackets, black gloves, and knitted blue Navy watch caps. R.T. at 969. The man he fought with, he said, had a thick mustache, and the man with the large knife had a thicker mustache and was dark complected--"he looked like an Indian, more or less, like an Indian dude." R.T. at 970. At trial eight months later Almengor repeated his description, adding that the man with the large knife was tall and had a thick, solid black mustache. R.T. at 376, 416, 417, 419-20, 424, 479. However, he could not recall at trial if

the man he fought with, whom he had identified as Mata, had a mustache. R.T. at 479. Almengor identified Mata and Gallegos in court as two of the assailants, R.T. at 374-75, but testified that he had been mistaken in his earlier identification of Vargas as the tall assailant with the large knife. R.T. at 501-02. Vargas, Almengor testified, was not as tall as the third attacker he saw. R.T. at 419.

Allen testified at trial that all three assailants wore state-issued clothes, gloves, and blue knit caps and had mustaches. R.T. at 621-22. However, in describing them to the defendants' private investigator on November 22, 1972, Allen stated that only one of the assailants had a mustache. R.T. at 1117-18. Also, he said he was not sure if they were Chicano or Caucasian. R.T. at 1118. Like Almengor, Allen made in-court

identifications of Mata and Gallegos and testified that he had been mistaken in his earlier identification of Vargas. R.T. at 587, 623-24.

The 15 photographs shown to Allen and Almengor on October 30 included 10 men with mustaches, six of whom were pictured in state clothes. Three of those six photographs were the updated photographs of the defendants, while the other three photographs were less than a year old. Although taken at different times, most of the 15 photographs in the group were similar in terms of size, color and pose. All of the inmates pictured were of Mexican descent.

D.

At trial Allen testified that prior to his making an identification, officers brought up with him the subject of his upcoming appearance before the parole board. R.T. at 634-35. He

testified that "[t]hey just said they would look at it, you know" and that "[t]hey said it wouldn't hurt." R.T. at 635. At the preliminary hearing he testified that prison officials said he could "be shipped" if he didn't cooperate. R.T. at 636. At trial he explained that this meant that if he didn't cooperate he might be sent "some other place" where he "[m]ight have a better change of getting killed," "or ending up getting myself deeper in trouble." Id. Allen had also told the defendant's private investigator on November 22 that one of the reasons he made the identification on October 30 was that he felt there was pressure from the Department of Corrections. R.T. at 1119.

III.

At trial the prosecution introduced evidence of the pretrial identifications by Allen and Almengor, as well as their

in-court identifications of Mata and Gallegos, as part of its case-in-chief. See R.T. at 365-506, 582-657, 707-804, 903-71. At the conclusion of the three-week trial that jury found all three defendants guilty of murder in the first degree; each was sentenced to life imprisonment. On direct appeal they raised for the first time the issue of impermissibly suggestive pretrial photographic identification procedures. In addressing this contention on its merits, the Fifth District Court of Appeal, after briefly reviewing the facts, see Fifth District Opinion at 2-3, rejected the argument on the following basis:

> Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that

> this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identifications by this action of the investigating officers.
>
> . . . .
>
> [W]e . . . find that the photographs were available for cross-examination purposes at trial. We further find that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.

Fifth District Opinion at 3-5.

We must accord the factual findings of the Fifth District the presumption of correctness required by 28 U.S.C. § 2254(d).[1/] Sumner v. Mata, 102 S. Ct. 1302, 1306-07 (1982). Unless one of the eight exceptions listed in section 2254(d) is found, e.g., that a finding is "not fairly supported by the record," we

must defer to the state court's findings. Id. at 1307.

We have presumed correct the Fifth District's description of the stabbing incident and the subsequent photographic procedures, contained at pages 2-3 of its opinion, and have incorporated those findings into our foregoing recitation of the facts. See part II supra. We conclude, however, that the Fifth District's rather sketchy account did not adequately develop the material facts concerning the witnesses' observations of the incident and the photographic procedures later employed by prison authorities. Therefore, our detailed account of the facts in part III supra includes additional facts and testimony, fairly supported by the record, that are material to the issue of photographic identification.

We have also examined the findings contained in the portions of the Fifth District's opinion quoted above and recognize, in accordance with the opinion of the Supreme Court, 102 S. Ct. at 1305, that certain of the findings therein are considerably at odds with the characterization of the facts in our earlier opinion. See Mata v. Sumner, 611 F.2d 754, 758-59 (9th Cir. 1979). In facing up to the conflict, 102 S. Ct. at 1307, we now specifically hold that certain of the Fifth District's findings are not fairly supported by the record and, therefore, need not be accorded the presumption of correctness mandated by section 2254. See 28 U.S.C. § 2254(d)(8); Sumner, 102 S. Ct. at 1307. In the following section we evaluate these findings in connection with the factors to be considered in determining the constitutionality of the pretrial identification procedures used

in this case--a mixed question of law and fact not governed by section 2254. See 102 S. Ct. at 1306.

IV.

Suggestive pretrial photographic identification procedures may taint in-court identifications sufficient to deny the accused due process of law. United States v. Field, 625 F.2d 862, 865 (9th Cir. 1980). As well, the admission of testimony concerning the out-of-court identification itself may work to deny due process. See Neil v. Biggers, 409 U.S. 188, 198 (1972). In both situations the identification evidence must be excluded "if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968); United States v. Hanigan, 681 F.2d at 1127,

1133 (9th Cir. 1982); Field, 625 F.2d at 865. See Biggers, 409 U.S. at 198 ("irreparability" is considered only in context of in-court identifications).

Our review of the trial court's admission of the in-court and out-of-court identification testimony must focus exclusively on the reliability of the identifications in light of the totality of surrounding circumstances. Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977); Biggers, 409 U.S. at 199; Simmons, 390 U.S. at 382; Field, 625 F.2d at 865-66. We must weight the "corrupting effect" of the challenged identification procedure against indicia of the witness' ability to make an accurate identification. Manson, 432 U.S. at 114; Biggers, 409 U.S. at 199-200; Field, 625 F.2d 867-68. Applying these standards to the facts fairly supported by the record in this case, we conclude that the state employed

photographic identification procedures so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.

A.

In Neil v. Biggers, 409 U.S. 188 (1972), the Supreme Court enunciated five factors that reflect a witness' ability to make an accurate identification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. / / / / / / Id. at 199-200. Each of these factors requires a finding of historical fact to which section 2254 applies. Sumner v. Mata, 102. S. Ct. 1303, 1307 n.10

(1982). We now consider the Biggers factors in light of the trial court record and the Fifth District's findings.

1. Opportunity to View

The Fifth District found that "the witnesses had an adequate opportunity to view the crime." Fifth District Opinion at 5. The relevant inquiry, however, is the witness' opportunity to view the criminal. Biggers, 409 U.S. at 199. We conclude that, at least with respect to witness Allen, the witness had no opportunity to observe the assailant later identified as Mata. To the extent the Fifth District's finding can be construed to be contrary, it is not fairly supported by the record. 28 U.S.C. § 2254(d)(8). Allen consistently testified that he did not see the person Almengor was fighting (allegedly Mata). Allen was preoccupied with the tall man who lunged at him with a large knife (allegedly

Vargas). After Allen backed away from this man he turned to yell for help and never again saw the assailants' faces. See part II(A) supra.

Almengor's opportunity to view the assailant he identified as Mata was somewhat better. After fist-fighting with this man Almengor faced him "eye-to eye" for "several minutes, several seconds." However, Almengor was not wearing his glasses at the time, and the entire incident lasted no longer than a few minutes. See id. Cf. United States v. Williams, 626 F.2d 697, 703 (9th Cir.), cert. denied, 449 U.S. 1030 (1980) (witness viewed bank robber for about 20 minutes at "close quarters"); United States v. Field, 625 F.2d 862, 865 (9th Cir. 1980) (witness viewed bank robber for only one minute from 2-3 feet; identification testimony held tainted). If the Fifth District can be

said to have described this as an "adequate" opportunity to view the criminal, that description is supported by the record. "Adequate," however, is a finding hardly specific enough upon which to rely in reaching a conclusion that must be based on the totality of the circumstances. Manson, 432 U.S. at 113-14. Therefore, we consider the specific details of Almengor's encounter with the assailant, see part II(A) supra, to be fairly supported by the record and to be relevant to his "opportunity . . . to view the criminal at the time of the crime." Biggers, 409 U.S. at 199.

2. Degree of Attention

Since a witness' degree of attention bears on his opportunity to view the criminal at the time of the crime, this factor overlaps somewhat with the first Biggers factor. The Fifth District made no specific finding concerning the

witness' degree of attention, although such a finding might be considered implicit in its finding that the witnesses had an "adequate opportunity to view the crime."

As noted above, Allen focused his attention on the assailant in front of him, not the man identified as Mata. Almengor, however, paid a great degree of attention to the assailant he identified as Mata since the two had fought and then had stood looking directly at each other. See part II(A) supra.

3. Accuracy of the Prior Description

The Fifth District found that the witnesses' "descriptions are accurate." To the extent this finding can be substantiated by reference to the trial court record, it is not fairly supported by the record in several respects. Almengor initially described only two of

the assailants as having mustaches; all three defendants, however, had mustaches on October 27, 1972. Allen initially stated that only one of the attackers had a mustache. Both witnesses changed their stories at trial and testified that all three assailants had mustaches. See part II(C) supra.

A related and more relevant inquiry is the certainty and detail with which the witnesses described the assailants. See Washington v. Cupp, 586 F.2d 134, 137 (9th Cir. 1978), cert. denied, 441 U.S. 909 (1979) ("victim provided a specific and detailed description"). Here, although Almengor was able to describe the assailants' clothing and complexion, his description clearly was not detailed. Cf. Biggers, 409 U.S. at 200 (description included assailant's approximate age, height, weight, complexion, skin texture, build, and voice); Washington, 586 F.2d

at 137 (description included race, height, build, hair style, complexion, age, facial characteristics, and clothing). Allen's description was even less certain and detailed: he could not remember whether the attackers were Caucasian or Chicano. See part II(C) supra.

4. Level of Certainty at Confrontation

Again, the Fifth District made no specific finding concerning this factor. Allen and Almengor expressed no certainty about any of the photographs until the photographic array on October 30. See part II(B) supra. The only person Almengor identified "positively"--Pete Nunez--was not even in the prison facility at the time of the attack. Six other "possible" identifications by Almengor were subsequently ruled out by prison officials.

Cf. United States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978) (no indication that witnesses had ever selected any other suspect than defendant). Allen was so uncertain that he was unable to make even a "possible" identification until October 30. See part II(B) supra. The certainty demonstrated by Allen and Almengor on October 30 came only after prison authorities employed the pretrial identification procedures here at issue.

5. Length of Time Between Crimes and Confrontation

Although prison investigators presented photographic arrays to Almengor on the day of the incident, and to Almengor and Allen eight days later, neither witness was able to make a positive identification. Not until October 30, eleven days after the stabbing, did Almengor and Allen identify the defendants' photographs. See part II(B) supra. While we

have held that a lapse of one week between the incident and the confrontation is not enough alone to render an identification inadmissible, see United States v. Hammond, 666 F.2d 435, 440 (9th Cir. 1981), the lapse of eleven days in this case is a factor to be considered in assessing the totality of the circumstances.

B.

Against these indicia of the witnesses' ability to make an accurate identification we are to weigh the corrupting effect of the photographic identification procedures employed by the prison authorities. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

1. Necessity of the Photographic Arrays

In a number of this Circuit's previous eyewitness identification cases, and in our initial opinion in Mata, we

stated that a two-step approach that focuses first on the necessity of the identification procedure employed is the proper inquiry in determining the admissibility of identification evidence. See, e.g., Mata v. Sumner, 611 F.2d 754, 757 (9th Cir. 1979), vacated and remanded, 449 U.S. 539 (1981); United States v. Peele, 574 F.2d 489, 490 (9th Cir. 1978); United States v. Flickinger, 573 F.2d 1349, 1358 (9th Cir.), cert. denied, 439 U.S. 836 (1978); United States v. Collins, 559 F.2d 561, 563 (9th Cir.), cert. denied, 434 U.S. 907 (1977); United States v. Valdivia, 492 F.2d 199, 210 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974); United States v. Baxter, 492 F.2d 150, 171 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973). Cf. United States v. Crawford, 576 F.2d 794, 797-98 (9th Cir.), cert. denied, 439 U.S. 851 (1978) (necessity for pretrial

photographic identification procedures should be considered but not as a separate first step). The consideration of necessity apparently stemmed from language by the Supreme Court in Simmons v. United States, 390 U.S. 377 (1968), suggesting that the propriety of using a photographic identification procedure was grounded in part on its necessity in the circumstances. 390 U.S. at 384-85. See Baxter, 492 F.2d at 171 ("The Simmons Court suggested two standards by which the permissibility of pretrial photographic identification should be judged. The first is whether the use of photographic identification was necessary in the particular case.")

The Government's need to use an inherently less reliable method of identification, e.g., photographic arrays, see Simmons, 390 U.S. at 386 n.6, would be a relevant factor if the due process

interest served by excluding identification evidence focused on the protection of an accused from the deliberate police use of suggestive identification measures. Cf. Manson, 432 U.S. at 111 (respondent urges that deterrence of improper identification practice is preeminent reason for rule that excludes evidence resulting from unnecessarily suggestive identification procedures without regard to its ultimate reliability); Neil v. Biggers, 409 U.S. 188, 198 (1972) ("[U]nnecessarily suggestive [confrontations] are condemned for the further reason that the increased chance of misidentification is gratuitous.") Due process, in this sense, would justify exclusion of identification evidence on grounds analogous to the exclusion of evidence of coerced, but true, confessions: it is reprehensible police conduct--the needless use of suggestive

identification measures that focus on the accused in order to secure a conviction--that due process of law prohibits.

> [W]hile an involuntary confession is inadmissible in part because such a confession is likely to be unreliable, it is also inadmissible even if it is true, because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."

Watkins v. Sowders, 449 U.S. 341, 347 (1981) (quoting Jackson v. Denno, 378 U.S. 368, 386 (1964).

In Manson, however, the Supreme Court made it clear that in requiring the exclusion of identification evidence that results from suggestive indentification procedures, the Due Process Clause protects solely an evidentiary interest, 432 U.S. at 113, an interest normally vindicated through the adversarial process of cross-examination,

id. at 113-14 n.14. See Simmons, 390 U.S. at 384. Due Process protects an accused by prohibiting a jury from hearing eyewitness testimony unless that evidence has aspects of reliability. Manson, 432 U.S. at 112. Thus, "reliability is the linchpin in determining the admissibility of identification testimony . . . ." Id. at 114. Unlike reliable confessions obtained through police pressure, eyewitness identification testimony obtained through suggestive and unnecessary procedures is nevertheless admissible if it retains "certain features of reliability." Id. at 110. See Watkins, 449 U.S. at 347-48. "[W]hen improper police conduct . . . does not taint the reliability of [the] witness' identification evidence, the defendant has nothing of which to complain." United States v. Field, 625 F.2d 862, 868 (9th Cir. 1980).

Therefore, we conclude that the rationales of Manson and Watkins dictate that the need, or lack of it, for the identification procedures employed by the prosecution's officers plays no part in the determination of the admissibility of identification evidence, a determination that focuses solely on reliability. This does not mean, however, that we cannot consider the fact that the officers chose to use a less reliable identification procedure (e.g., photographic array) over a normally more reliable procedure (e.g., corporeal line-up). See Simmons, 390 U.S. at 386 n.6. The mere fact that a less reliable method was used clearly bears on the extent of the corruptive effect of the identification procedure. We hold only that, because a defendant's due process interest in this context is only evidentiary, and concerned solely with

reliablility, the extent to which the officers needed to use a certain identification procedure cannot render eyewitness identification testimony admissible or, on the other hand, mandate its exclusion.

We find that prison authorities in this case chose to use photographic arrays, an identification procedure inherently less reliable than corporeal line-ups. See Simmons, 390 U.S. at 386 n.6. "Even if the police . . . follow the most correct photographic identification procedures and show [the witness] the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification." 390 U.S. at 383. For the reasons discussed above, however, we do not consider relevant whether this procedure was necessary; we find only that its relative

unreliability in comparison with line-ups is a factor to be considered in the totality of the circumstances.

2. Suggestive Identification Procedures

In addition to the use of an inherently less reliable identification method, the record is replete with instances of suggestiveness in the identification procedures employed by prison officials. Almengor was shown photographs on not one, but three different occasions; Allen viewed photographs twice. Our statement in United States v. Higginbotham, 539 F.2d 17, 23 (9th Cir. 1976) is apposite:

> While the repeated showing to a witness of photographic displays for the purpose of identification presents opportunities for abuse and due process problems, when it is shown that the witness was equivocal on the first selection and became firm on a latter showing, that rule should not be applied where the witness has been consistently firm.

In the final photographic array on October 30 prison authorities removed photographs that had been identified earlier by Almengor as "possibly" the assailants and drastically reduced the total number of photographs. The new photographs of the defendants were the only ones updated for the October 30 array. Allen and Almengor were housed in segregation with the defendants and saw them taken to have their pictures retaken; Allen stated at one point that because of this he assumed the three defendants were the participants in the stabbing. The Fifth District's finding that the record supports no showing that this action influenced the witnesses' identification is itself not fairly supported by the record in this case. 28 U.S.C. § 2254(d)(8). Finally, uncontradicted testimony by Allen shows that prison authorities brought pressure to

bear upon him by threatening him with getting "shipped" if he didn't cooperate. The state court's finding that there was no showing of influence by the investigating officers is likewise not fairly supported by the record. 28 U.S.C. § 2254(d)(8).

C.

Only after these actions by prison investigators did Allen and Almengor identify Mata and his codefendants as the assailants. Keeping in mind that our purpose is to "judge whether the identification was the product of observations at the time of the crime or impressions made during the suggestive pretrial photographic identification process," United States v. Field, 625 F.2d 862, 866 (9th Cir. 1980), we remain firmly convinced that the circumstances of this case show the latter. Giving due deference to those findings of the

Fifth District that are fairly supported by the record, we hold that in the totality of the surrounding circumstances the pretrial photographic procedures employed here were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The admission of the in-court identifications and evidence of the pretrial identifications of Mata by Allen and Almengor, therefore, was error. See Field, 625 F.2d at 869-70. Moreover, we cannot conclude that such error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967); United States v. Stubblefield, 621 F.2d 980, 983 (9th Cir. 1980); Green v. Loggins, 614 F.2d 219, 225 (9th Cir. 1980). Although the prosecution introduced some circumstantial evidence of Mata's guilt, its case was based primarily on the pretrial and in-court

identifications by Almengor, Allen, and a third witness. We cannot say admission of the identification evidence was harmless when we do not know which witness the jury may have believed. Field, 625 F.2d at 870.

Accordingly, the order the District Court is reversed. Upon remand, the District Court may hold the Petition in abeyance for a period of ninety days, within which time the state prosecutors may, if they so choose, initiate a new trial against Mata, a trial in which prosecutorial evidence barred by the Federal Constitution will not be introduced.

REVERSED and REMANDED, with directions.

FOOTNOTES:

1.

Section 2254(d) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter

matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7),

> inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d).

Mata v. Sumner, No. 78-2636

SNEED, Circuit Judge, dissenting:

Reluctantly and respectfully I must dissent for the third time in this case:

Eleven courts have considered various aspects of petitioner Mata's claims. Only this court, on three separate occasions, has responded favorably.

Mata was convicted of first-degree murder in the Superior Court of Kern County, California. He appealed his conviction to the California Court of Appeal for the Fifth District, where he alleged for the first time that his constitutional rights were violated by the pretrial identifiction procedures discussed in the majority opinion. The California Court of Appeal affirmed the conviction, and made specific findings of fact concerning Mata's claims. Mata filed a petition for writ of habeas corpus in the Superior Court of Marin

County, California. That court denied the petition, as did the California Court of Appeal for the Fifth District and the California Supreme Court.

Finally, Mata sought collateral review in the federal courts. The district court refused to issue a writ of habeas corpus. This court twice gave judgment in favor of Mata, 611 F.2d 754 (9th Cir. 1979); 649 F.2d 713 (9th Cir. 1981), and twice had its opinion vacated and remanded by the Supreme Court, with instructions to comply with the requirements of 28 U.S.C. § 2254(d). Sumner v. Mata, 449 U.S. 539 (1981) ["Mata I"]; Sumner v. Mata, 102 S. ct. 1303 (1982) ["Mata II"].

My present dissent, like its immediate predecessor, is shaped in part by the Supreme Court's immediately preceding remand. Thus, I now dissent because in my view the findings of fact in the state

proceedings before the California Court of Appeal are "fairly supported by the record" as required by 28 U.S.C. § 2254(d)(8). Also I continue to insist that the pretrial identification procedures were not impermissibly suggestive and that any error in the identification of Mata that might have existed was harmless. Finally, I reject the majority's view that the failure to hold a lineup deprives the petitioner of his constitutional due process rights.

I.

THE APPLICATION OF SECTION 2254(d)(8)

A. Section 2254(d)

To minimize the friction that inevitably has resulted from federal habeas corpus review, and to show respect for principles of comity and federalism, Congress, as the Supreme Court explained in Mata I, in 1966 enacted 29 U.S.C. § 2254(d) as an amendment to the Federal

Habeas Act of 1867. 449 U.S. 539 at 550; Suggs v. LaVallee, 570 F.2d 1092, 1112 (2d Cir.), cert. denied, 439 U.S. 915 (1978). Under section 2254(d), as the Supreme Court stated in Mata I, and repeated emphatically in Mata II, a federal court engaged in habeas corpus review of a state decision must presume the findings of fact made in the state court system to be correct.

Two exceptions to this presumption exist. First, the federal court may disregard the state findings of fact if the habeas corpus petitioner can prove "by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d). Proof by "convincing evidence" is a burden more rigorous than the "preponderance of the evidence" standard." 449 U.S. at 551. Second, the federal court may defeat the presumption of correctness if it finds

that the requirements of section 2254(d)(1)-(7) or section 2254(d)(8) are satisfied. If the federal court bases its decision on this second exception, it is obliged to explain specifically the reasons for its conclusion. 102 S. Ct. at 1307; 449 U.S. at 552.

Moreover, a finding by the reviewing court that one of these exceptions applies to a particular finding of fact does not relieve that court of the duty to defer to the state court's other findings of fact. The federal court is not free to put aside its obligation to defer to these other findings merely because another particular state finding is held not to be fairly supported by the record. The majority recognizes this in Part III of its opinion. See also Harris v. Pulley, slip. op. at 4386 (9th Cir. Sept. 16, 1982).

B. Exceptions to Section 2254(d)

It is clear from Mata II that if the facts found in the Fifth District Opinion are correct, there is no support for the majority's conclusion that a deprivation of due process rights has taken place. See 102 S. Ct. at 1306-07 & n.6. Thus, the majority in the final analysis must rely on an exception to section 2254(d) to support its holding.

The "convincing evidence" exception to section 2254(d) cannot apply here. Five courts have found that the state findings of fact was correct, and the Supreme Court has twice had the opportunity to uncover such "convincing evidence," but has declined to do so. Moreover, the majority has not pointed to any "convincing evidence" in the three times that this case has been before us; indeed, on the previous remand, the

majority found that it was "substantially" in agreement with the state court's factual findings. 649 F.2d at 717.

The majority therefore looks to section 2254(d)(8) to escape the presumption that the Fifth District's findings of fact are correct. Majority Opinion at 13. Under this section the presumption of correctness of state court findings of fact can be disregarded where the federal court, after a review of the record of the state proceeding, concludes that the record "does not fairly support" the state findings. No other basis for refusing to defer to state findings of facts is available to the majority.

The majority appears to assume that a record "does not fairly support" the state court when a federal reviewing court disagrees with the state court's

interpretation of the record. See Majority Opinion at 12-13. Such a construction fails to give due deference to a state court's factual determination and to reflect the intent of Congress in enacting section 2254(d)(8). See p. 4 supra.

Section 2254(d) was promulgated in response to Townsend v. Sain, 372 U.S. 293 91963), and it is to that case that one must turn when seeking the meaning of the statute. See Culyer v. Sullivan, 446 U.S. 335, 341-42 (1980); see also 649 F.2d at 716 n.6. Townsend refers us to Blackburn v. Alabama, 361 U.S. 199 (1960), and Fiske v. Kansas, 274 U.S. 380 (1927), for the meaning of "fairly support." See 372 U.S. at 313, 316. According to these cases, a finding is not fairly supported by the record if it is "shown by the record to be without evidence to support it." 274 U.S. at

385. See also 361 U.S. at 208-09 (a finding "without any evidence in the record" is not fairly supported by it).

Thus, to apply section 2254(d)(8) properly one must ask whether there is any evidence in the record to support the state court's finding of fact. Moreover, when the record is searched for support for the state findings, it embraces the entire record. It is not limited by the text of the state opinion, as the majority assumes. Majority Opinion at 12-13. See Townsend v. Sain, 372 U.S. at 314-15; Fowler v. Jago, 683 F.2d 983, 987 (6th Cir. 1982). If any evidence that fairly supports the state finding can be found in the record, the federal court must presume the state finding to be correct, in the absence of invocation of the "convincing evidence" exception previously discussed.[1/] See United States ex rel. Jones v. Franzen,

676 F.2d 261, 264-65 (7th Cir. 1982). See also United States v. Warden, Illinois State Penitentiary, 566 F.2d 28, 30 (7th Cir. 1977) (a federal court should defer to a state court finding of fact, "particularly when a state appellate court has made an independent factual review of an adequate record"); Hardeman v. California, 445 F.2d 258, 259 (9th Cir.) (Ely, J.) ("A full and fair evidentiary hearing on this was conducted by the California courts, and the District Court was thus entitled to accept the factual determination of the state courts"), cert. denied, 404 U.S. 998 (1971).[2/] Finally, to invoke section 2254(d)(8) to overcome the presumption of correctness, a federal court must give a satisfactory explanation for its decision. Mata II, 102 S. Ct. at 1307.

In the remainder of this portion of my dissent I shall analyze the record

in a manner consistent with these principles.

C. The Record Fairly Supports the State Court's Findings

The Supreme Court in Mata II distinguished between the underlying "historical facts" and the application of law to those facts in considering a habeas corpus petition under 28 U.S.C. § 2254(d). 102 S. Ct. at 1306-07. Making this distinction is not always easy and infrequently can be done without some dispute. However, it is legitimate to characterize the following key sentence of the California Court of Appeal's opinion as a recitation of findings of "historical facts":

> We find further that there is no showing of influence by the investigating officers[;] that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate.

Excerpt of Record at 82-83. The record clearly supports each of these three findings.[3/]

1. No Showing of Influence by the Investigating Officers

The record establishes that Almengor was not subjected to any pressure to make an identification of the assailants. Lieutenant King testified that Almengor was not told that he was a suspect in the slaying, and that Almengor was never threatened in any way with being charged with the crime. R.T. at 764-65. The only promise made to Almengor was that he would be protected, and the possibility of withholding Almengor's parole was not a consideration when he was interrogated. R.T. at 726-28. Almengor confirmed that he was promised nothing and was not threatened by the investigating officers. R.T. at 751.

Allen's testimony also shows that he was neither promised anything nor threatened by the investigating officer. R.T. at 649-50, 800. Parol considerations did not affect his actions. R.T. at 969. Allen's initial hesitation about participating in the investigation of the murder was caused by his reluctance to get involved. Allen testified:

> Q Now, when you were telling the correctional officers the Sheriff's officers that you couldn't identify anybody, and they showed you pictures that you couldn't identify, and you couldn't identify anybody, were you telling the truth to them, or were you just trying to not get involved?
>
> A Just trying to not get involved.
>
> Q When you finally identified three people from pictures, like you told us before, were you at that time doing your honest best to identify the people who actually were involved?
>
> A Yes, sir.

> Q Did the correctional officers or the Sheriff's officers try to tell you or attempt to tell you in any way who you should identifiy?
>
> A No. They just had a bunch of pictures laid out.

R.T. at 640.

The majority admits that the array from which the identifications were made was composed of photographs that were "similar in terms of size, color, and pose. All of the inmates pictured were of Mexican descent." Majority Opinion at 10. There was no allegation that any suggestive procedures were employed during the identification sessions.

The majority argues, however, that Almengor and Allen were influenced by seeing the prison authorities remove the three defendants from segregation to have their photographs taken. Almengor's testimony shows that he did not see Mata on his way to the photographer, R.T. at

444-46, and Allen could not recall saying to the defendants' private investigator that he had witnessed the incident. R.T. at 634. Moreover, the California Court of Appeal found that the record does not show that Almengor and Allen were influenced in any way by the incident, even assuming that they had seen it.

2. The Witnesses Had an Adequate Opportunity to View the Crime

Almengor had an excellent opportunity to see both Mata and the crime itself. Almengor testified that he was "reasonably close" to Mata at the time of the murder, R.T. at 391, was opposite him, R.T. at 742-43, and looked him in the face. R.T. at 382. Almengor said that he saw Mata stab at the victim, R.T. at 393, and "sloop over." Id. Almengor then fought hand-to-hand with

Mata "all the way up the dorm." R.T. at 381, 393; 453-56.

Allen had less of an opportunity to see Mata, since Vargas had attacked Allen when he tried to intervene in the assault. R.T. at 624-26. But Allen did get some view of the three attackers, R.T. at 586, 593-94, and was able to describe their appearance. R.T. at 621-22.

3. The Witnesses' Descriptions Were Accurate

Almengor described the height, weight, build, complexion, and clothes of Mata. R.T. at 375-76, 419, 969-71. See note 11 infra. Almengor also gave a description of the details of the crime, including Mata's exact movements during the entire assault. R.T. at 391-93. Allen also described the clothes of the assailants, as well as the attack, and had seen enough of the fight to recognize

the attackers later by their photographs. R.T. at 585-94, 801, 1117. Other testimony confirmed details of these descriptions. E.g., R.T. at 510, 658-62, 1176-77. The California Court of Appeal found that the witnesses' descriptions were accurate, the only evidence to the contrary being the testimony of defendants' private investigator concerning a possible variation in two details of Allen's testimony. R.T. at 1117-18.

4. Conclusion

I conclude that each of the three findings of the California Court of Appeal is supported by the record. The presumption of correctness provided by section 2254(d) attaches to these findings. The majority errs in not recognizing this. See Townsend v. Sain, 372 U.S. 293, 313-16 (1963).

II

SUGGESTIVE IDENTIFICATION CLAIM

A. An Application of the Underlying Facts Does Not Establish a Due Process Violation

As the Court put it in Manson v. Braithwaite, 432 U.S. 98 (1977), "reliability is the linchpin in determining the admissibility of identification testimony . . . ." Id. at 114. But while "reliability" may by the inquiry's "linchpin," a reviewing court must remember that, as a "linchpin" serves to keep the wheel from slipping off the axletree, so "reliability" is but the key to ensuring that no due process violations occurs. The fundamental issue remains whether the facts establish a due process violation. See Part IV infra.

The reliability of an identification is determined by reference to the five factors set out in Neil v. Biggers, 409 U.S. 188, 199-20 (1972). These include

"the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." See Mata II, 102 S. Ct. at 1307 n.10; Manson, 432 U.S. at 114. I shall consider each of these factors.

1. Adequate Opportunity to View

The California Court of Appeal found that the witnesses had an adequate opportunity to view the "crime," and, as pointed out above, there is evidence in the record to support the finding. The majority contends that the Neil v. Biggers test refers to the opportunity to view the "criminal," not merely the "crime." Assuming, arguendo, the majority is correct, it does not follow

that the state court finding is entitled to no deference. It is entitled to deference if it is supported by the record as a whole. See Townsend v. Sain, 372 U.S. at 314-15. The record shows that both Almengor and Allen saw the three men involved in the attack as well as the crime itself. R.T. at 392-93, 586.

Admittedly, Allen could not see all three assailants well. R.T. at 586. But the majority's reference to Allen's statement after the assault that he saw nothing should be viewed in the context of Allen's initial refusal to talk to the authorities about the crime. See R.T. 631, 649-50.

The majority concedes, however, that Almengor's opportunity to view Mata was "adequate," but argues that adequacy is "a finding hardly specific enough upon which to rely in reaching a conclusion that must be based on the totality of

of the circumstances." Majority Opinion at 16. This will not do. Neil v. Biggers requires no more than an "adequate opportunity." If the opportunity was adequate, that factor in the test is satisfied. Such satisfaction cannot also indicate a violation of Mata's due process rights. See Mata II, 102 S. Ct. at 1306 n.6.

2. Degree of Attention

The majority is correct when it states that Almengor paid a great deal of attention to the assailant he identified as Mata, but that Allen focused his attention on the attacker in front of him.

3. Accuracy of the Prior Description

The California Court of Appeal found that the descriptions of both witnesses were accurate. There is evidence in the record to support that finding. R.T. at

375-76, 391-93, 419, 510, 586-94, 621-24, 741-42, 801-02.

4. Level of Certainty at Confrontation

The state court found that Almengor made three "possible" identifications on October 19 - not "positive" identification, as the majority claims. Majority Opinion at 18. And since no photograph shown to the witness before October 30 resembled Mata's appearance at the time of the assault, the witnesses understandably were "uncertain," id., as the state court indicates.

The state court found that both Almengor and Allen identified Mata on October 30 - the first time that the witnesses were shown a recent photograph of him. See my first dissent, 611 F.2d at 761 (Sneed, J., dissenting). The record shows that the October 30 identifications of Mata were "positive." R.T. at 718-22.

5. Length of Time Between the Crime and the Confrontation

The California Court of Appeal found that eleven days passed between the date of the crime and that of the identification of Mata. The majority conceded that the lapse of a week does not render an identification unreliable. Nor does eleven days. See United States v. Hammond, 666 F.2d 435, 440 (9th Cir. 1982). See also United States v. Scriber, 499 F.2d 1041, 1046-47 (D.C. Cir. 1974) (identification 11 days after crime is reliable); United States v. Kulp, 365 F. Supp. 747, 758-59 (E.D. Pa. 1973), aff'd mem., 497 F.2d 921 (3d Cir. 1974) ("several weeks").

6. Summary

The examination of Neil v. Biggers test in the light of the section 2254(d) presumption of correctness shows that the Neil v. Biggers test is satisfied,

and that the identifications are reliable. The California Court of Appeal found that both Almengor and Allen had an adequate opportunity to view the crime and described the assailants accurately. Both witnesses made positive identifications of Mata at the first opportunity to do so, and the identification took place reasonably soon after the crime. Almengor, it is true, paid much more attention to Mata than did Allen, but that should not render Allen's testimony unreliable. United States v. Hammond, 666 F.2d at 440 & n.2.

B. There is No Need to Balance the "Corrupting Effect" of the Identification Procedure in this Case

The majority weighs the reliability of the identifications against "the corrupting effect of the photographic identification procedures employed by the prison authorities." Majority Opinion at 19. The majority bases this balancing

test on the language of Manson v. Braithwaite, 432 U.S. 98, 114 (1977). The majority, however, misunderstands the "corrupting effect" test.

The Manson Court held that the reviewing court must weigh against the Neil v. Biggers factors "the corrupting effect of the suggestive identification itself." Id. (emphasis added). Weighing is not required when the identification is not "suggestive" although prudence suggests that weighing might well accompany all identifications. "Suggestive identifications" can occur in the case of a single photograph shown to a witness for identification, id. at 116, a photographic array designed to make the identification the result of impressions gained during the identification process rather than during the crime, United States v. Hanigan, 681 F.2d 1127, 1133 (9th Cir. 1982), or a

one-person "showup." Stylers v. Smith, 659 F.2d 293, 297 (2d Cir. 1981). In contrast, the Manson Court expressly approved a photographic array including a reasonable number of persons who resemble the suspect, 432 U.S. at 117, precisely the type of array used in the identification of Robert Mata. See 611 F.2d at 756.

Nonetheless, the majority finds that the identification procedures in the present case were "suggestive." The majority makes six allegations to support its finding of suggestiveness. These are (1) that Almengor was shown photographs on three occasions, (2) that photographs previously identified by Almengor as "possible" were removed from the array, (3) that the array was reduced in size, (4) that the defendants' photographs were the only ones updated for the October 30 array, (5) that Almengor and Allen saw

Mata being taken out to be photographed, and (6) that the prison authorities put pressure on Allen to cooperate. Majority Opinion at 24. The finding of the majority is impermissible under a proper reading of § 2254(d).

To begin with, a finding of suggestiveness or no by a state court is a mixed question of law and fact, to which the reviewing court must defer unless an exception to section 2254(d) is applicable. Mata II, 102 S. Ct. at 1306-07. The state court here found the identification to be fair and not suggestive. No exception to § 2254(d) is available. The record supports the state court's findings.

First, Almengor was shown a photographic array on three occasions because, as it turned out, there were no up-to-date, and therefore identifiable, photographs in the earlier arrays

of the men later picked out by Almengor as the assailants. R.T. at 595-96, 721-22. United States v. Higginbotham, 539 F.2d 17, 23 (9th Cir. 1976), approves the showing of two different photographic arrays to a witness, while condemning "repeated" showings of the same photographic display in the hope that the witness eventually will identify someone - a situation not alleged here. See also United States v. Brown, 461 F.2d 134, 142-43 (D.C. Cir. 1972) (en banc) (three arrays and a lineup before identification made is not suggestive).

Second, the two photographs identified by Almengor as "possible" were not included in the October 30 array because the persons identified could not have participated in the assault. Keeping the photographs in the array would not have advanced the search for truth.

Third, the reduction in the size of the photographic array is irrelevant, as long as the size is "reasonable," as this array was. Manson, 432 U.S. at 117.

Fourth, although the three defendants in this case were the only ones to have their photographs updated for the October 30 array, all of the photographs displayed on that day were reprinted so as to appear identical. R.T. at 716.

Fifth, Almengor did not see Mata being taken out to be photographed, R.T. at 444-45, and Allen may not have seen the incident. R.T. at 634. Moreover, the California Court of Appeal found that there was no showing by Mata that Allen was influenced by having seen Mata on his way to the photographer.

Finally, there is the question of undue police influence on Allen. The state court found that there was no

showing of influence by the investigative officers on Almengor and Allen, and the record supports that finding. See Part I, supra; 611 F.2d at 760-61 (Sneed, J., dissenting). The federal court should presume this underlying finding of fact to be correct. Mata II, 102 S. Ct. at 1306-07.

Thus, I would acknowledge that the identification procedures employed by the investigative officers here were not, for the purposes of habeas corpus proceedings under § 2254, unduly "suggestive." Therefore these procedures had no "corrupting effect" that requires the weighing mandated by the Manson Court. However, a weighing of the non-suggestive procedures, as prudence dictates, against the Neil v. Biggers factors only strengthens my conclusion that the majority erred in granting Mata's petition. No due process violation occcurred.

III.

ANY ERROR WAS HARMLESS

Finally, any error was harmless, beyond a reasonable doubt. The federal district court so held.[4] The majority disregards that holding,[5] and finds that error was not harmless. Majority Opinion at 25. By so doing, the majority ignores the strongly inculpating evidence against Mata apart from the testimony of Allen, overestimates the dimensions of any error in Almengor's identification of Mata, and fails to evaluate properly the role of the jury in evaluating the evidence against Mata.

First, the majority does not mention that the testimony of the "third witness," Paul Childress, an inmate who knew Mata, positively identified Mata as taking part in the murder.[6] There was also testimony about a Mexican Mafia plot involving Mata to kill Arias, the

victim.[7] And other testimony indicated that Mata had shown the testifying witness how Mata had "hit" the victim.[8] Moreover, a blood-stained jacket and knife were found in a locker near Mata's bed. R.T. at 658-62.

Second, the only meaningful defect in Almengor's identification of Mata is that Almengor did not pick Mata out of a photographic array until eleven days after the murder.[9] But Almengor's identification occurred the first time that he saw a recent photograph of Mata. Unlike Allen, Almengor did not see Mata being led out to have his photograph taken,[10] and there is no allegation that Almengor was subjected to any pressure on the part of the prison authorities to make an identification. As the district court put it, the identification of Mata by Almengor was "strong." Excerpt of Record at 96.

Finally, the majority cites to United States v. Field, 625 F.2d 862 (9th Cir. 1980), for the proposition that any error in the identification of Mata could not be harmless because "we do not know which witness the jury may have believed." Majority Opinion at 25. The majority misreads Field and the evidence in the present case.

In Field, the defendant was convicted on the basis of identifications by three witnesses. 625 F.2d at 865. The court held that two witnesses were subjected to unconstitutionally suggestive identification procedures and that the testimony of the third was highly unreliable. Id. at 668-70. The court concluded that any error could not have been harmless since there was no reliable witness who had identified the defendants as the criminal whom the jury could have believed.

That is not the case here. The witness Childress made a positive identification of Mata, and Almengor's testimony, especially taken in the context of the circumstantial evidence against Mata, is very strong. Allen's identifiction may be suspect, but his testimony is merely cumulative. Moreover, the majority says at most that Allen identified out of fear of retaliation by the prison authorities, not out of a desire to cover up for someone else. See R.T. at 801. Such fear, even if it existed, provides no reason to assume that Allen's identification of Mata was incorrect.

Given the strength of the case against Mata, I conclude that the district court was correct in holding that any error is harmless beyond a reasonable doubt.

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IV.

FAILURE TO HOLD A LINEUP

The majority holds that federal courts in this Circuit should consider police use of photographic arrays instead of lineups as a factor which "bears on the extent of the corruptive effect of the identification procedure" when deciding whether a pretrial identification violates a suspect's constitutional rights. Majority Opinion at 22. According to the majority, this court should "consider the fact that the officers chose to use a less reliable identification procedure (e.g., photographic array) over a normally more reliable procedure (e.g., corporeal lineup)." Majority Opinion at 22 (emphasis in original). Presumably, such use suggests at least the possibility of a due process violation.

However, it is plain that an accused has no constitutional right to a lineup rather than a photographic array. See United States v. Robertson, 606 F.2d 853, 857 (9th Cir. 1979). Nonetheless, the majority seeks to accomplish indirectly what the law explicitly rejects.

The majority effectively would force the police to abandon arrays in favor of lineups whenever possivle. As Justice Stevens pointed out in Mata II, the issue the majority resolves has been "lurking in the background of this case." 102 S. Ct. at 1307 (Steven, J., dissenting). I continue to dissent from this needless intervention into the identification procedures employed by the police.

I explained in my first Mata dissent, 611 F.2d at 760-61, that requiring the police to employ a lineup when investigating a crime committed in a prison would place a terrible strain on

prison resources.[11] The majority now compounds the problem by making its principle apply with equal force outside the prison walls.

To the majority the price of due process compliance is unrelated to its substance. Majority Opinion at 19-23. In terms of logic the majority is correct. In terms of practical judgment the majority is wrong. The courts cannot fashion rules to govern police conduct in a vacuum. We must take into account the dangers that both police and prison authorities face, and the role that these groups play in preserving the fabric of society in shaping the contours of constitutional due process. See, e.g., Terry v. Ohio, 392 U.S. 1, 22-24 (1968). No judge with whom I am acquainted would assert, when pressed, to the contrary.

The Supreme Court has never said that identification by means of a photographic array including "so far as practicable . . . a reasonable number of persons similar to any person then suspected," Manson v. Braithwaite, 432 U.S. at 117 (citation omitted), is contrary to constitutional due process. Rather, the Manson Court recommended the use of an array substantially identical to that employed in the identification of Robert Mata. Id. The Court in Simmons v. United States, 390 U.s. 377, 387 n. 6 (1968), did suggest in dictum that some types of photographic arrays might be less accurate than a lineup, but the Simmons Court did not find a due process violation even with an array of just six photographs. Id.[12]/

The fact remains that the Supreme Court since Simmons has never forbidden the use of an array of photographs for

identification, has never held unconstitutional such an identification procedure, and has never held that the use of an array constitutes a suggestive identifiction technique having a corrupting effect on identification testimony. See, e.g., Tibbs v. Florida, 102 S. Ct. 2211, 2213 n.2 (1982); United States v. Ash, 413 U.S. 300 (1973).

The majority's holding therefore goes far beyond the Supreme Court's photographic array decisions. It beckons to the Supreme Court to follow after its lead; but I had always thought out duty was to follow the way marked out by the Supreme Court, not to lead it, even when our way might appear to us to be the true path of righteousness.

FOOTNOTES

1. Piche v. Rhay, 422 F.2d 1309 (9th Cir. 1970), the only Ninth Circuit case to address this issue, noted that a federal court must accept the findings of a state trier of fact if the state findings are reliable - that is, "supported by substantial evidence." Id. at 1311. While Piche might have adopted a more rigorous standard of review than that of Townsend v. Sain, it is irrelevant for the purposes of this case, since there is more than "substantial evidence" to support the Fifth District Opinion.

2. In Lonberger v. Jago, 651 F.2d 447 (6th Cir. 1981) a case similar to the present one, the court concluded that the state court's finding that the petitioner's guilty plea was involuntary was not fairly supported by the record. The court did not, however, seek support for the state court finding before reaching its decision. The Supreme Court has granted certiorari. 102 S. Ct. 998 (1982).

3. The Fifth District Opinion is a 16-page document covering a number of constitutional and evidentiary challenges to the convictions of Mata and his co-defendants. The relevant sections, annotated with references to the record, state:

> I. The Photographic Lineup Procedure.
>
> Both appellants Gellegos and Mata contend that there were prejudicial errors in the

pretrial identification of them by certain prosecution witnesses.

Three inmate witnesses testified that they saw the stabbing take place. All three -- Childress, Almengor, and Allen -- identified all three defendants; but their testimony is attacked by appellants Gallegos and Mata on the basis of claimed improper pretrial photographic identification procedures. The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. [R.T. at 397, 422]. He made a possible identification of appellant Vargas [R.T. at 423], but made possible misidentifications of the other two participants [R.T. at 712-13, 766]. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants [R.T. at 402, 718]. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. [R.T. at 595, 721]. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. [R.T. at 722] . . . .

Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that this makes their identification inadmissible. But they make no showing, and the records supports none, that the witnesses were in fact influenced in their identifications by this action of the investigating officers.

. . . [A] violation of due process occurs and a conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (See Simmons v. United States)
. . . .

Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. [R.T. at 712-17]. We further find that there is no showing of influence by the investigating officers [R.T. at 649-50, 726-28, 751, 764-65, 800, 953, 968-69][;] that the witnesses had an adequate opportunity to view the

> crime [R.T. at 381-82, 391-93, 439, 453-56, 586, 593-94, 624-26, 741-42, 801-02]; and that their descriptions are accurate. [R.T. at 375-76, 391-93, 419, 510, 586-94, 621-24, 658-72, 801, 969-71]. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.

Excerpt of Record at 81-83 (emphasis in original). The Fifth District also found in confirmation of the eyewitness testimony that:

> . . . Eye witness testimony placed all of the appellants at the scene of the murder and participating in it. [R.T. at 279, 375-83, 510, 587]. Physical evidence, including gloves, a knife, and a jacket with blood on it were found. [R.T. at 658-61, 670-72].

Id. at 92.

4. The district court also found that any irregularities in the pretrial identification of Robert Mata did not amount to a violation of his constitutional rights.

The relevant portion of the district court opinion states: "On the merits, the Court concludes the petition must be denied. While petitioner has established that irregularities occurred in the pre-trial photographic identification of petitioner by witnesses

Almengor and Allen, these irregularities did not so taint the in-court identifications of petitioner by these witnesses as to establish a constitutional violation under Simmons v. United States, 390 U.S. 377, 384 (1968). See United States v. Baxter, 492 F.2d 150, 172 (9th Cir. 1972), cert. denied, 414 U.S. 801 (1973), 416 u.S. 940 (1974)." Excerpt of Record at 95-96.

The district court's findings were on a mixed question of law and fact. Mata II, 102 S. Ct. at 1306. As such, they are entitled to deference on our part. At the moment, we apply a "clearly erroneous" standard of review to a district court's finding in a mixed question of law and fact. Maxwell v. Sumner, 673 F.2d 1031, 1035-36 & n.5 (9th Cir. 1982).

The majority does not address the standard of review of the district court opinion, and therefore does not explain why it has chosen not to defer to the district court. It should have done so.

The district court did not, of course, have the benefit of guidance from the Supreme Court on the importance of 28 U.S.C. § 2254(d), as did the majority in its previous and present opinions. The district court, therefore, did not explain whether it complied with section 2254(d) in evaluating the Fifth District Opinion, or whether it made a de novo examination of the record.

As I noted in my second dissent in this case, it might be sensible to remand this case to the district court to give Mata the opportunity there to rebut the Fifth District's findings. 649 F.2d at

718 (Sneed, J., dissenting). As our three-fold consideration of Mata's claims vividly illustrates, it is not in the interests of judicial economy to have a Court of Appeals review the facts of this type of petition when a district court is equally able to do so.

5. The district court stated that "even if the testimony of Allen was tainted, the positive identification of petitioner by witness Childress and the strong one by Almengor makes [sic] the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967)." Excerpt of Record at 96. It should be noted that the district court followed the same harmless error standard as the present majority. See Majority Opinion at 25.

6. Respondents summarize this evidence: "Childress testified that he was acquainted with petitioner [Mata] and co-defendant Gallegos prior to the crime, (RT 268) that he witnessed the crime (RT 275-278) and he made in-court identifications of Mata, Gallegos and Vargas as the assailants (RT 279). Childress testified that on October 20, 1972, the day after the incident, he reported to Lieutenant Mills what he had witnessed and verbally identified Mata and Gallego by their known names, "Biggs" and "David" (RT 284-285). Childress testified that he then identified all three defendants' photographs from the Rolodex of pictures of hundreds of inmates (RT 285-286). Lieutenant Mills testified that he isolated the photographs of Mata and Gallegos and Childress confirmed their identity and then again picked their photos from the

Rolodex (RT 676-677). Childress testified that he never had any doubt about his identification of the three defendants (RT 286-287)." Respondent's Return to the Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus, Excerpt of Record at 42.

7. "Carlos Ortega, the chief of the Mexican Mafia at Techachapi[,] testified that petitioner Mata and the defendant Vargas, also members of the Mafia, contacted him and Mata told him that the victim was due to arrive at the prison, and they were ordered "to hit" the victim (RT 822-824). The next day, October 19, he and petitioner Mata and defendant Gallegos met, and they urged Ortega "to get down" meaning to arm himself with a knife and stab the intended victim (RT 82]8). Mata and Gallegos departed, and defendant Vargas approached Ortega. Mata and Gallegos returned, Mata tried to give Ortega a knife which Ortega identified as one of the murder weapons, and Mata said he had another knife in his belt (RT 8[29]-831). Ortega refused, and Vargas called him a "cry baby" in Spanish (RT 832).

"Ortega and Gallegos were among several inmates transferred to Tracy after the incident. En route, Gallegos said, "My knife broke when I hit him. We all worked out on it." (RT 83[8])." Id. at 48.

8. "Joe Escobar testified that he is a member of the rival group, Nuestra Familia, the group to which the victim also belonged (RT 1154). Just before the stabbing took place, Escobar saw

petitioner and his two co-defendants walking toward dorm 8 where the stabbing took place (RT 1175-1178). Escobar saw co-defendant Gallegos a short time later; his face was flushed and he appeared excited (RT 1118). That evening Escobar saw petitioner Mata who motioned to himself and smiled, indicating that he had "hit" the victim (RT 1183-1184)." Id.

9. The majority also contends that Almengor's description of Mata to the police "clearly was not detailed." I fail to see how the majority reached this conclusion. Almengor described the height, build, weight, complexion, and clothes of Mata. R.T. at 419, 969-71. The description in Neil v. Biggers, characterized by the Court as "more than ordinarily thorough," 409 U.S. at 200, only added to Almengor's list the age, skin texture, and voice of the suspect. Id. But even if the majority's contention were true, the Neil v. Biggers test refers us to the "accuracy" of the prior description, not the amount of detail in it. Id. at 199; United States v. Hanigan, 681 F.2d 1127, 1133 (9th Cir. 1982). See Mata II, 201 S. Ct. at 1306 n.6. Moreover, the inadequacy - or even absence - of a pre-trial description of the defendant by a witness in this context carries litle weight in deciding whether a pre-trial identification is "reliable." See United States v. Hammond, 666 F.2d 435, 440 (9th Cir. 1982).

10. The majority's statement to the contrary, Majority Opinion at 24, finds no support in the record. R.T. at 444-45.

11. I wrote: "The prison setting of the crime for which appellant was convicted and the investigation thereafter by prison officials in my opinion dictate the use of photographic identification procedures. Apparently the majority insists as a matter of constitutional law that there be employed lineups of a large group of inmates, with each suspect, or more likely a substantial group of inmates, which would include the suspects, suitably equipped with counsel, in lieu of photographic identification procedures. See [611 F.2d at] P. 759 n.1. To state the requirement reveals its impracticability. Moreover, it would impose heavy demands on the staff, strain employee relations, and expose the inmates to increased risk of bodily harm.

12. The array in Simmons was therefore smaller than the arrays used in the identification of Mata. Moreover, I doubt whether the present membership of the Court would agree with the Simmons Court's dictum on photograph arrays. See e.g., United States v. Ash, 413 U.S. 300, 319-21 (1973).